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# CIVIL JUSTICE REVIEW

First Report

March 1995



Ontario  
Court of  
Justice



Ministry of  
the Attorney  
General

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First Report

March 1995

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## CIVIL JUSTICE REVIEW

180 Dundas St. W., Suite 2005  
Toronto ON M5G 1Z8

The Honourable Mr. Justice R. A. Blair  
Ontario Court of Justice

Sandra Lang  
Assistant Deputy Attorney General  
Courts Administration Division



## RÉVISION DE LA JUSTICE CIVILE

180, rue Dundas ouest, bureau 2005  
Toronto ON M5G 1Z8

Monsieur le juge R. A. Blair  
Cour de justice de l'Ontario

Sandra Lang  
Sous-procureure générale adjointe  
Division de l'administration des tribunaux

Telephone/Téléphone: (416) 325-8564  
Fax/Télécopieur: (416) 325-8568

March 7, 1995

The Honourable Roy R. McMurtry  
Chief Justice of the Ontario Court  
(General Division)  
130 Queen Street West  
Toronto, Ontario  
M5H 2N5


The Honourable Marion Boyd  
Attorney General,  
Ministry of the Attorney General  
11th Floor, 720 Bay Street  
Toronto, Ontario  
M5G 2K1

Dear Chief Justice and Madam Attorney General:

We are pleased to submit for your consideration the First Report of the Civil Justice Review team.

As we set out to identify the tangible implementable solutions to the problems plaguing the court system, we quickly discovered that the establishment of a very solid foundation upon which to build the system is imperative. The recommendations made to you in this report are intended to lay the groundwork for a civil justice system which meets the benchmark criteria established at the outset of our deliberations:

- fairness
- affordability
- accessibility
- timeliness
- accountability
- efficiency & cost-effectiveness
- a streamlined process and administration



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It is our belief, that the process of the Review represents the beginning of a collective dialogue among the partners in civil justice. The good will and support demonstrated by the bench, bar, government representatives and the public in working together towards collective solutions were truly encouraging. It is still however a fragile dialogue and will need to be nurtured through you and the leadership of your agents.

Although this document is only our first report, we feel strongly that the implementation process recommended should begin now. In our view, it will not be necessary to await the results of our Final Report before initiating action. The task ahead of us is enormous. We need to get on with the plan for implementation while the window of change remains open.

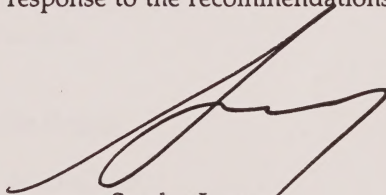
We would not have truly finished the first chapter of this review process if we did not acknowledge and thank the hundreds of people who gave of their time and experience to educate and inform us. In particular, the members of the Interim Group are to be commended for their significant contribution and commitment to the challenge at hand. Real thanks needs to go to our staff support team in recognition of their tireless efforts in every step in the process leading up to and including the production of our First Report.

Finally, we would like to thank you for your trust and support throughout the year.

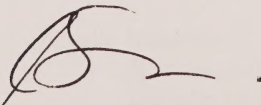
We look forward to your considered response to the recommendations in this report.



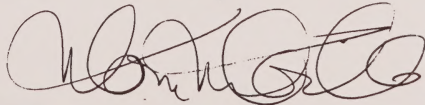
The Hon. Robert A. Blair  
Ontario Court of Justice  
(General Division)  
Co-Chair  
Civil Justice Review



Sandra Lang  
Assistant Deputy Attorney General  
Courts Administration Division  
Co-Chair  
Civil Justice Review



Terrence J. O'Sullivan  
Barrister and Solicitor  
Partner  
McMillan, Binch  
Task Force Member  
Civil Justice Review



Mary McConville  
Executive Director  
Ontario Association of Children's Aid  
Societies  
Task Force Member  
Civil Justice Review





## **MEMBERS OF THE REVIEW**

### **Co-Chairs**

- The Hon. Mr. Justice Robert A. Blair  
Ontario Court of Justice (General Division)
- Sandra Lang  
Assistant Deputy Attorney General  
Courts Administration Division

### **Task Force**

- The Hon. Mr. Justice Robert A. Blair
- Sandra Lang
- Mary McConville
  - Public Representative
  - Executive Director, Ontario Association of Children's Aid Societies
  - Member, Regional Courts Management Advisory Committee, Metro Toronto
- Terrence O'Sullivan
  - Bar Representative
  - Partner, McMillan, Binch, Toronto

### **Interim Group**

- The Hon. Madame Justice Jean L. MacFarland
  - Regional Senior Justice, Central East Region
- Andre Lacroix
  - Bar Representative
  - Partner, Lacroix, Forest, Sudbury
- Leslie Macleod
  - Representative  
Ministry of the Attorney General
  - Assistant Deputy Attorney General, Civil Division
- Rose Dotten
  - Public Representative West Region
  - Teacher/Librarian, Simcoe County Board of Education
  - Member, Regional Courts Management Advisory Committee,  
Central West Region



## Formal Liaison with The Court of Appeal

### **Fundamental Group**

- John McCamus
  - Chair
  - Ontario Law Reform Commission
- Doug Ewart
  - Director, Policy Division
  - Ministry of the Attorney General
- Terrence O'Sullivan
  - Bar Representative
- Judith Webb
  - Public Representative
  - Principal, George Ross Secondary School
  - Member, Regional Courts Management Advisory Committee, South West Region
- The Hon. Madame Justice Jean L. MacFarland
  - Regional Senior Justice, Central East Region

### **Staff**

- |                                 |                             |
|---------------------------------|-----------------------------|
| • Debra Paulseth                | • Counsel                   |
| • Robert Beaudoin               | • Senior Project Consultant |
| • Terry Cyr                     | • Technology Consultant     |
| • Sukanya Pillay/Celine Lamarre | • Judges' Law Clerks        |
| • Lori McCullough/Helen Gourley | • Secretaries               |





## **ONTARIO CIVIL JUSTICE REVIEW**

### **TERMS OF REFERENCE**

#### **PREAMBLE:**

Traditionally, in Ontario, members of the public have resolved their civil disputes through the court process. This process - based primarily upon the adversarial method of dispute resolution - has ultimately led to justice.

In recent times, however, because of the pressures of modern litigation, such justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays.

The members of the public require a more efficient, less costly, speedier and more accessible civil justice system.

#### **A CIVIL JUSTICE REVIEW:**

To achieve this objective, the Government of Ontario and the Ontario Court of Justice (General Division), in co-operation with the Bar, have agreed to undertake a broad review of the civil justice system in Ontario. This review is mandated to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice. It will identify the various problems within the existing system and design specific and implementable solutions to these problems.

The Review will be conducted by a small Task Force jointly chaired by The Hon. Robert Blair, a Justice of the Ontario Court of Justice (General Division), and Ms. Sandra Lang, the Assistant Deputy Attorney General - Courts Administration. There will be two other members of the Task Force: a senior representative of the Bar and a representative of the public.

The Review will conduct its mandate through two separate groups: an Interim Task Group and a Fundamental Review Task Group. Each will be responsible directly to the Task Force itself. The Interim Task Group will be supervised by Justice Blair and Ms. Lang. The Fundamental Review Group will be supervised by the Chair of the Ontario Law Reform Commission and the Director - Policy Development Division of the Attorney General

## **A. Interim Task Group**

The Interim Task Group will be responsible for identifying immediate points of pressure on the system and for developing proposals, to be implemented in the short/intermediate term, dealing with such things as:

- a) the backlog;
- b) case flow management and alternative resolution techniques;
- c) venue for civil cases;
- d) management information systems, scheduling, tracking and statistics gathering;
- e) the re-organization of administrative staff and courts administration;
- f) Judicial support work and auxiliary judicial officers;
- g) temporary court rooms;
- h) construction lien caseload;
- i) issues respecting the jurisdiction and staffing of Small Claims courts;
- j) the design of strategies to address other pressures and problems identified but not dealt with.

This will involve not only the creation and development of new solutions, but also the co-ordination and integration of the several initiatives already underway amongst the judiciary, the Bar and Courts Administration. In this latter category are such things as:

- a) the current case management projects in Toronto, Windsor and Sault Ste.Marie;
- b) the pending ADR Centre in Toronto;
- c) the recently launched Advocates' Society Civil Litigation Task Force;
- d) the current "Simplified Rules" study, designed to develop a new set of more easily understood and applied rules for cases involving smaller amounts of money;
- e) a review of the appropriate venue for civil cases;
- f) the review of electronic data interchange and its application to the courts, already begun by the Ministry;
- g) the Toronto court re-engineering project which is now underway.

## **B. Fundamental Review Group**

It will be the function of the Fundamental Review Group to deal with issues of longer range implications for the civil justice system. Although longer range in its focus than the Interim Task Group, the Fundamental Review Group will nonetheless concentrate on recommendations and proposals that are achievable rather than simply for purposes of discussions.

The Review will draw upon the resources and skills of the Chair of the Ontario Law Reform Commission and the Director of Policy Development Division in connection with this aspect of its work. It may ask the Attorney General to request the

Commission to review and report on matters fundamental to the Civil Justice System and the Review will take such Reports as are forthcoming into consideration in arriving at its ultimate recommendations regarding its long range proposals.

Some areas which are to be considered in this aspect of the Review's mandate are the following:

- a) the role and function of civil juries;
- b) the question of how the superior trial courts can most appropriately and effectively carry out their mandate in dealing with civil cases, in terms of the way in which various types of cases are processed within and/or outside of the courts;
- c) the role of Small Claims courts in providing effective access to the system, and the jurisdiction and structure of such courts;
- d) the role of private industry in providing alternative methods for parties to resolve issues without resorting to the judicial process. This would include mediation, arbitration and other alternative dispute resolution processes;
- e) the role and obligations of litigants to avail themselves of the various resolution initiatives provided by the court prior to the entitlement to a trial.

## **Time Frames**

### **Interim Task Group Report**

It is expected that the Interim report will be completed by November 1994.

### **Overall Review Report**

It is expected that the review will have completed its final report by the Spring of 1995.

### **General Considerations**

The Review will consider the way in which resources are allocated to the justice system and the criteria upon which such allocation is based, whether the appointment of additional resources is needed and justified, and in what ways existing resources can be effectively re-allocated and re-aligned.





# CIVIL JUSTICE REVIEW

## FIRST REPORT

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**PART I**  
**BACKGROUND AND VISION**



## CHAPTER 1

### THE MODERN CIVIL JUSTICE SYSTEM: AN OVERVIEW

#### SUMMARY OF THE FIRST REPORT

*Disputes, unlike wine, do not improve by aging. Many things happen to a cause and to parties in a dispute by the simple passage of time, and almost none of them are good. Delay in settlement or disposal of conflicting claims is ... a primary enemy of justice and peace in the community.*

- Willard Z. Estey

*When the system works, it works well, and many cases testify to that;  
But when it goes off the rails, people tend to remember the bad experience.*

*It's not perfect, but its better than a shotgun in a field, like in some other countries."*

- Citizen at a public meeting

## 1.1 SETTING THE STAGE

### The Need for the Review

We will do well to remember those statements.

No civilized society can remain stable without a mechanism whereby its members can resolve their disputes peacefully and, where necessary, in a binding fashion. The alternative to such a mechanism is chaos at best, and unbridled violence at worst.

Unreasonable delay in the disposition of disputes is, indeed, "*the enemy of justice and peace* in the community". It leads inevitably to unreasonable costs. It breeds inaccessibility. It fosters frustration, and frustrates fairness. The administration of justice falls into disrepute.

People become alienated.

Patterns of this nature have been developing in Ontario over the past number of years. Unacceptable delays and mounting costs, with their attendant implications for inaccessibility and mistrust of the system, have become endemic.

Backlogs are mushrooming on the crowded urban calendars of Toronto, Ottawa, Windsor, Brampton, Newmarket and Whitby, to name only the hardest hit centres. There is more civil litigation. It is more complex. It takes longer to prepare, to settle and to try. It is fostered by an increasingly "rights-oriented" and litigious society; enhanced in the prism of mass media coverage; and nurtured by a continuing onslaught of legislation from all levels of government giving people more and more opportunities to go to court.

These developments pose serious threats to the civil justice system which, simply put, is in a crisis situation.

### **The Civil Justice Review**

The Civil Justice Review has been established at the joint initiative of the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario to address these problems and to propose "specific and implementable solutions" for them. Its mandate is,

to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice.

In addressing the concept of a modern civil justice system, and what its features should be, we determined that we would measure our recommendations against the following criteria, which we see as the legitimizing principles underlying such a system. These benchmarks are:

- Fairness
- Affordability
- Accessibility
- Timeliness
- Efficiency and Cost-Effectiveness
- Accountability, and
- A Streamlined Process and Administration

### **Characteristics of the Modern Civil Justice System**

To meet these benchmarks, in our view, a modern civil justice system for Ontario must have at least the following characteristics:

- 1) It must have the confidence of the public, and the public must have a legitimate and meaningful involvement in the way the system works.
- 2) It must be properly and adequately funded and resourced.
- 3) It must focus on "dispute resolution" as a whole, and make available to the public, on an institutional basis, both the traditional court adjudication processes and the whole panoply of alternative dispute resolution ("ADR") techniques which enable parties to work out their disputes on their own or with the assistance of a third party.
- 4) Its courts must be presided over by an impartial and completely independent judiciary, the members of which must be of the highest calibre and character and who must be representative of the society they are being entrusted to judge. As the civil justice system evolves, judges, we believe, will be called upon to bring skills as case managers and general dispute resolvers to their role as well.
- 5) Its administration must likewise be staffed by qualified and trained personnel at all levels.

- 6) It must feature a unified management, administration and budgetary model for the administration of the justice system, featuring clearly defined lines of responsibility.
- 7) It must be equipped with modern computer and electronic technology to enable the participants in the system to work effectively as an integrated whole.
- 8) It must operate under the model of caseload management, a time and event managing system which facilitates early resolution of cases, reduces delay and backlogs, and lowers the cost of litigation. Caseload management shifts the overall management of cases through the time parameters from the Bar -- where it has traditionally been -- to the judiciary, streamlines the process, permits the introduction of ADR techniques, and creates an environment where judges, administrators and quasi-judicial officials can work together to integrate the various elements of the system into a co-ordinated whole.

These themes and concepts are developed in more detail throughout this, our First Report and will continue to evolve, in consultation with the various participants in the justice system, as we work toward our Final Report later this year. What follows in the remainder of this Chapter is a brief commentary on the more significant features, in order to set the context for our recommendations.

## **1.2 PUBLIC CONFIDENCE AND PARTICIPATION**

In order for the public to have a feeling of confidence in the integrity of their civil justice system they are entitled to:

- 1) timely and affordable civil justice
- 2) be able to understand the system which provides that justice, at least in its fundamental elements if not in its procedural complexities and,
- 3) basic, straightforward, information to assist it when it comes into contact with the system.



As the noted American jurist, Justice Felix Frankfurter, expressed it:

"The Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction"

Like most other institutions in to-day's society, the Courts are the subject of increasing scrutiny by the public and the media. This scrutiny makes it ever more apparent that the Court be worthy of the public confidence which is the ultimate basis for societies willingness to accept it's decisions.

This is particularly so at a time when the *Charter of Rights and Freedoms* has placed the Courts at the centre of many controversies which in former days were the sole preserve of the Legislatures and Parliament. At the same time, new and proliferating legislation in areas such as family law, consumer protection law, environmental law, class actions and tax and corporate-commercial law -- to name only a few -- is placing the civil justice system in the public eye on a daily basis.

As a result, the public is demanding more of a say about what goes on in the justice system, and the ability to participate in a meaningful way in affecting what happens. As the public member of the Review put it, there is presently

"no meaningful and substantive role for the citizen in the justice system. Citizens are less willing today to place blind faith and trust in institutions, in professionals and in elected officials. They are more demanding of accountability, more insistent on openness and more determined to be involved in actively shaping our institutions."<sup>1</sup>

The Civil Justice Review agrees that the public must be given a more participatory role in the civil justice system, and we have elaborated on this view in the Chapter called "Changing Attitudes, Roles and Responsibilities.

---

<sup>1</sup>Remarks by Mary McConville at a Conference involving judges, court administrators and government representatives, lawyers and members of the public, held at Geneva Park on October 24, 1994; published in *The Advocates' Brief*, a publication of the Advocates' Society, Vol. 6, No. 4, November 1994.

### 1.3 DISPUTE RESOLUTION AS A WHOLE: THE COURTS AND ADR, or, THE "MULTI-DOOR" APPROACH

Civil justice is a foundational institution in our society. We believe that the State has an obligation to make available to its members the means by which their disputes may be resolved, peacefully, through the medium of independent, objective and fair third party intervention.

This involves more, in our times, than simply the presence of courts as we have traditionally known them, albeit, the adjudicative role of an independent judiciary will remain a central and indispensable aspect of any civil justice system. Experience in our own and most other jurisdictions shows us that the vast majority of all cases settle before trial. We need to focus our attention on the process for disposition of this great majority of cases, as well as continuing to concentrate on those that do go to trial.

In a broader sense, then, "the Court" should become a "dispute resolution centre" -- a place where people go to have their differences resolved in a fashion which is most appropriate to their particular situation. This may involve resort to one or another of the wide panoply of "alternative dispute resolution" ("ADR") techniques that are available, or it may involve resort to the traditional litigation path towards court adjudication. In either case the State, in our opinion, has an obligation to ensure that these options are available to the members of the public. This is what is meant by the "multi-door" concept of dispute resolution. There are a variety of "doors" through which disputants may go, in order to find the best method of resolving their differences.

ADR is not a panacea, but among its strengths is the veritable smorgasbord of techniques which it makes available to enable the parties *to create procedures and solutions that are tailor-made for their circumstances*. The public should have access, within the rubric of its civil justice system, to these alternative mechanisms for finding

a resolution to their own disputes themselves, either on their own or with the assistance of a third party.

At the same time, it remains essential -- indeed, fundamental -- that the civil justice system provide an impartial and fair tribunal to determine the parties' disputes in a binding fashion, when they cannot do so themselves. This tribunal we know traditionally as a "Court".

## **1.4 THE ALLOCATION AND USE OF RESOURCES**

The modern civil justice system will re-think the way it utilizes its resources. It will re-allocate existing resources in an effective way and it will invest in new resources which will enable it to provide a higher quality of justice in a less costly and more efficient manner in the long term. By "resources" we are referring to human resources, technology, physical facilities and funding.

### **(a) Human Resources**

People perform different functions and roles in the justice system. We must see that they are able to do so in the most effective manner possible in order to ensure the highest quality of justice. This means that the civil justice system must allocate its personnel, in the course of processing its case load, in a fashion which facilitates the right people performing the right tasks at the right stage in the proceedings.

The people working in the system must be highly qualified, and they must be provided with the necessary support and training to permit them to perform their functions and roles properly.

Judges are responsible for adjudicating, for assisting the parties in settling, and -- in their evolving roles as case managers -- for managing the flow of cases through the system. Court administrators are responsible for administration, for managing the

operation of the system and for maintaining the necessary infrastructure to ensure that the system can and does work.

We believe that in between the case processing functions performed by court administrators, on the one hand, and those performed by judges, on the other hand, there is a wide range of activities which can be dealt with more expeditiously and in a more cost-effective manner by non-administrators and non-judges. These activities do not require a judge for their performance, but they do require legal training, some case management and ADR skills, and the ability to exercise discretion and make decisions of a quasi-judicial nature. We are proposing the creation of an officer of the Court to be known as a "Judicial Support Officer" to fill this role.

As will be apparent in the reading of this First Report, we are proposing that judges, court administrators and judicial support officers can most effectively carry out their roles in the context of a system of caseload management. We recommend that they do so in "case management teams" consisting of judges, judicial support officers and case management co-ordinators, and that the concept of "judicial teams" be extended across the province to facilitate the implementation of this approach.

In this way, we see judges, quasi-judicial officials and administrators being able to devote their time and energies in the most effective manner to their true functions and roles in the system.

## **(b) An Independent Judiciary**

To ensure the requisite high quality of justice and the fair and impartial determination of matters coming before the Courts, a strong, and completely independent judiciary is essential. An independent judiciary is one of the hallmarks of our free and democratic society. This is not just a trite platitude: any reforms to the justice system must be measured against the need to preserve that value.

In addition, those who are appointed to the judiciary must be of the highest calibre, experienced in the practice of law and in life, and reflective of the make-up of the society whose people they are being asked to judge. With case flow management techniques likely to become more prevalent, judges need to acquire skills in utilizing ADR processes and in the management of case loads as well.

**(c) Courthouses and Facilities**

A civil justice system requires courthouses and facilities for the trial and disposition of cases. They are expensive, but they are also an important symbol that justice is present in the community.

Modern courthouses must be designed to meet the needs of the modern justice system. They will be centres for dispute resolution in a caseload managed system, not simply centres for the disposition of cases by trial. Accordingly, they must be designed to accommodate the exigencies of such a system. They will require real courtrooms for the trial of those actions which must be tried, but they will also require other rooms and facilities for case management activities, ADR processes and case conferences. Their efficient use of court facilities will depend on their flexibility and adaptability while equipped with up-to-date multi-media technology capacity.

**(d) Technology**

Our vision of the civil justice system will require a modern computer and electronic technology infrastructure. Nothing less will enable the participants in the system to work effectively as an integrated whole, and to provide the necessary information and data for the management of the system.

Automation in Ontario is modest, at best. While there are some applications in operation in various locations -- particularly in connection with the three case management pilot projects in Windsor, Sault Ste Marie and Toronto -- and while the Ministry is currently gathering operating data from across the Province and inputting



it into a computer data base, these efforts are sporadic, not necessarily compatible, and insufficient. What is needed is a province-wide network and system that will allow those who work in the civil justice system to have access to common data banks, that will generate reliable statistical data for analysis and management purposes, and that will eliminate at least part of the avalanche of paper which is engulfing and paralysing the system.

There are many applications of computer and electronic technology *available on the commercial market and ready for utilisation to-day*, which could make the system function more effectively. Although they involve initial capital expenditures in terms of hardware, software and training, *these technologies will save money in the long run and are worth the investment*. They include -- to name but a few -- applications which permit:

- a) electronic filing of documents directly from lawyers offices to the court data bank;
- b) imaging, to input documents brought to the courthouse by litigants acting on their own behalf and who do not have the equipment for electronic filing;
- c) automatic payment by debit or credit card;
- d) video conferencing;
- e) the generation of accurate statistics for purposes of financial and administrative management;
- f) the scheduling of cases, motions, case conferences and most other "events" in the system;
- g) the storage of data with much smaller space requirements and in a manner that makes it accessible simultaneously by anyone requiring and entitled to access, from anywhere, for any number of purposes related to the processing of cases.

Apart from the enhanced management information that would be generated from the investment in these technologies, the amount of savings in terms of reduced paper flow, reduced storage and the re-allocation of staff will be very significant.

The Bench, the Bar, Government, and the rule-makers need to embrace the concept of modernizing the civil justice system so that the introduction of technology will flow smoothly.

**(e) Proper and Adequate Funding**

The modern civil justice system must be properly and adequately funded.

At present, the Ontario Government allocates 0.54% of its total budget to courts administration. If one takes into account the revenues generated by civil justice through fees, the annual *net* allocation to courts administration is closer to 1/4 of 1%. This has been the pattern for many years. At the same time, courts administration's share of the budget for the entire Ministry of the Attorney General has been progressively decreasing, due in part to the increase in funding for Legal Aid.

What is required, in our opinion, is a complete re-evaluation of the way in which resources are allocated and protected for Courts Administration. At the moment, the budget for Courts Administration is buried in the overall budget of the Ministry of the Attorney General. In our view, it should be separated and dealt with on its own footing, particularly in light of our suggestion for a unified management model. When funding considerations for the administration and infrastructure of the justice system are mixed in with overall ministry priorities -- many of which are understandably "policy" or "program" oriented -- they are too easily "shunted to the rear" in the face of competing demands for diminishing resources.

The justice system is not a black hole down which governments must simply pour more money, more judges and more resources. The system must be accountable and made to operate in a way that demonstrates the effective use of existing resources already allocated to it. However, the effective utilization of existing resources *and* the judicious investment of new and additional resources *are both* pivotal to a properly functioning civil justice system.

We have attempted to identify practical efficiencies which can be introduced within the civil court system and which will lead to savings. This, coupled with the streamlined and cost-effective nature of the new system that we are proposing, will lead to an availability of resources which, we believe, will provide the primary source of the funding needed to effect the changes we propose.

Technology initiatives are one area where the investment of new funds is justifiable. That new investment *now* will pay dividends in terms of savings and efficiencies which will allow for re-investment to support the modern civil justice system.

This type of investment strategy will place the system on a proper financial footing and provide the needed savings to enable the re-thinking and re-allocation of existing resources to be done in other areas more effectively.

## **1.5 A UNIFIED MANAGEMENT, ADMINISTRATION AND BUDGETARY MODEL**

At the present time, the the management and budgetary administration of justice in Ontario is in bi-furcated hands.

Management and administration are partly the responsibility of the judiciary, but primarily the responsibility of Courts Administration. Budgeting is solely within the purview of Courts Administration, and through it, the Executive branch of government and the Legislature.

Judges are accountable for matters of administration bearing directly on the exercise of their judicial function. Primarily, this responsibility embraces control over the lists and the scheduling of cases, and over the assignment of judges and courtrooms for the hearing of those cases. This responsibility is a necessary adjunct to the preservation of the institutional independence of the judiciary.

On the other hand, the Ministry of the Attorney General -- the major litigant in the courts -- is responsible for the budget which enables the judiciary to perform these "judicial administration" functions. At the same time, the Ministry, through its Courts Administration branch, is responsible for virtually all other matters which provide the infrastructure to enable the judiciary to perform their general judicial functions. The statutory jurisdiction over staff, the administration budget generally, financing, technology, organization and physical facilities rests with the Ministry.

The lack of a unified model, with a single line of accountability and clear lines of authority has led to increasing difficulties, and increasing friction between the Ministry and the Judiciary. General fiscal restraints, as governments endeavour to spread existing resources over an increasing array of public demands, have enhanced these difficulties and frictions, and made it urgent that they be addressed, in the interests of an effectively operating justice system. Compounding the problems has been a culture which has historically kept communications between Judiciary and Ministry to a minimum, on the theory that a judge's task is to adjudicate and an administrator's, to administer.

We have concluded that the justice system can no longer function effectively in Ontario unless and until a single authority, with clear lines of responsibility and accountability, is established to deal with all administrative, financial and budgetary, and operational matters relating to court administration in the Province. This is an issue which cuts across the boundaries of the civil justice system, itself, and affects the system as a whole. Nonetheless, we believe that it must be dealt with if the civil

justice system, in the long run, is to become effective.

In a Chapter entitled "Creating a Responsible Justice System Structure" we have recommended that steps be taken immediately to establish a single issue task force for the purpose of developing an implementable proposal for the creation of a unified management, administration and budgetary structure for the court system in Ontario.

## **1.6 CHANGING ATTITUDES, ROLES AND RESPONSIBILITIES**

One of the most frequently asked questions during our consultation phase -- usually, but not always, by the public -- was,

"Who's in charge here?"

Partly this was a reflection of the tensions and inefficiencies springing from the lack of an effective management, administration and budgeting system referred to above. Partly it was a recognition that those who are the participants in the civil justice system -- judges, administrators and lawyers, in particular -- do not seem to share a sense of common responsibility for the operation of the system.

We have mentioned the difficulties and tensions between Ministry and Judiciary. The Bar, too, plays an integral role in the administration of the system. It represents the clients who use the system in the system. It has influence through that very representation and through various professional organizations and its governing body, the Law Society of Upper Canada. Like its co-participants in the system, the Bar occasionally marches to the tune of its own drummer (or drummers) as well.

All of this has led to these three constituencies becoming "the three solitudes".



We are happy to be able to report that the walls between the "three solitudes" appear to be falling. There is a growing recognition that a sense of co-management of the system and of shared responsibility for its results is essential to making it operate in a proper fashion, in the interests of the public. The Chapter entitled "Changing Attitudes, Roles and Responsibilities" elaborates on this theme.

## 1.7 MANAGEMENT OF CASES

The Civil Justice Review recommends the establishment of caseflow management on a Province-wide basis.

The results of the three pilot projects in Windsor, Sault Ste Marie and Toronto have demonstrated that case management works *if it is properly resourced, effectively planned, and the people working within the system are adequately trained*. It promotes the earlier resolution and disposition of cases, reduces delay and backlog, ultimately lowers the cost of litigation, and, consequently, adds to the satisfaction of litigants.

Caseflow management is a concept which offers great potential, in our opinion, for combining and co-ordinating the various disparate elements of the civil justice system and for integrating them into a more effective whole. The creation of judicial teams across the Province, and of case management teams involving judges, judicial support officers and case management co-ordinators is central to this concept. Circuiting of judges from one Region to another is also an important feature of this province-wide orchestration of resources and personnel.

We develop this notion more fully in that portion of the Report dealing with "Management of Cases".

## 1.8 ADDITIONAL AREAS

Family matters, small claims and landlord and tenant matters receive separate attention in the Report. They are the three areas of civil justice that touch people the most.

Family law was a subject which dominated the public consultation phase of the Review. Family disputes engender enormous hardship, cost and emotional strain. We have endeavoured to reflect the concerns expressed and to set out a proposal which will alleviate at least some of the strains created by the system. The new process will be resolution focused. Information Services will be made available to the public to provide explanations about court proceedings -- what is required, and what may be expected; about the impact of parental separation and court proceedings on children and the services available to assist in that regard; and about alternative dispute resolution resources that are available. Early judicial intervention is proposed for most cases, even before the first motion or interim relief. The development of standard affidavits setting out the essential information required for interim relief is encouraged, in an attempt to minimize what we were frequently told was the forever damaging aspect of many of the "affidavit wars" between spouses.

With respect to Small Claims Court and Landlord and Tenant matters, we have put forward some preliminary observations and proposals. Further studies are being done in these areas in connection with the fundamental issues group of the Civil Justice Review, however, and we will return to these subjects again in our Final Report.

In connection with the Rules governing the practice in the Court, we have made a number of suggestions regarding the need for more responsiveness and demystification. In particular, however, we have recommended that the proposal put forward by the Simplified Civil Rules Subcommittee regarding a procedure for cases involving money or property valued at under \$40,000 be adopted. The principle

recommendations of that proposal are the elimination of oral examinations for discovery and the elimination of cross-examinations on affidavits in interlocutory matters, in those types of cases.

## **1.9 THE MODERN CIVIL JUSTICE SYSTEM: WHAT WILL IT LOOK LIKE IN 10 YEARS?**

What, then, in summary, is the vision for the modern civil justice system of the next decade and the beginning of the next century?

We began this Overview by noting the guiding principles underlying the deliberations of the Civil Justice Review:

- fairness
- affordability
- accessibility
- timeliness
- accountability
- efficiency and cost-effectiveness
- a streamlined process and administration

Based upon our deliberations to date, and measured against the foregoing benchmarks, we offer the following concept:

## THE MODERN CIVIL JUSTICE SYSTEM

### IN 10 YEARS:

#### WHAT WILL IT LOOK LIKE ?

1. It will focus on **DISPUTE RESOLUTION AS A WHOLE**,
2. Centering on a "**MULTI-DOOR CONCEPT**", and
3. Featuring an **INDEPENDENT AND CIRCUITING COURT**, employing **CASE FLOW MANAGEMENT** as the vehicle for:
  - **screening** cases into appropriate streams;
  - processing those cases in accordance with given **time parameters which will be enforced**;
  - **integrating** the various **dispute resolution techniques** and **case management mechanisms** *into a co-ordinated whole*; and,
  - encouraging **early resolution**; while,
  - **utilising** the **right blend of** judicial, quasi-judicial and administrative **personnel** to do so.
4. **Small Claims and Landlord and Tenant** matters will be dealt with **separately and in a more simplified fashion**.
5. **Underpinning all** of this will be a **strategically and properly funded infrastructure** of *facilities*, computer and electronic *technology* and *properly trained personnel*, all administered through
6. **A unified management, administrative and budgetary structure** with clear lines of responsibility and accountability; and finally,
7. The system will be made as **simplified and understandable** as reasonably possible, and will provide methods to incorporate **public participation** and accountability in a legitimate way.

## 1.10 CONCLUSION

Although this vision may seem ambitious, we are confident that our recommendations are sufficiently "specific and implementable" that the Government and the Court can act immediately upon them. Some of our initial recommendations can be implemented immediately. Others require further analysis and input, which will be the subject of the Review's efforts pending its final Report.

In this First Report, we have endeavoured to set out the framework for the civil justice system of the future, as we envisage it. Some aspects of this framework remain to be developed further -- aspects dealing in particular, with the cost of justice (in its various dimensions); with the creation of the unified management, administration and budgetary model; with the way in which judicial resources are allocated to the Province and the criteria for doing so; small claims matters; with landlord and tenant matters; and with the implementation of technology.

Our Report sets out our plans for implementation.

We have listened to, and not forgotten, the innumerable individual suggestions and proposals that we have received. Each is valuable in its own right. Many will necessarily be addressed and incorporated in the course of putting our concept of the civil justice system into effect. In some cases it will be readily apparent that this is so. Other suggestions will be fleshed out in the course of the next phase of the Review.

The members of the Civil Justice Review appreciate the considerable lengths to which many people went to provide constructive input to our process, and the efforts that went into that input. The process itself has been a significant contributor to the evolution of a new sense of co-operation amongst the participants in the justice



system. There currently exists a will for change on the part of those participants, we perceive, and a willingness to take the time and expend the effort needed to effect that change.

It is a window of opportunity not to be missed.

## **CHAPTER 2**

### **LIST OF RECOMMENDATIONS**

There is a lengthy series of recommendations made throughout this First Report designed to move the civil justice system towards the goals we have envisioned. For ease of reference, they are gathered here by chapter and under the various headings where they are found in the Report. They begin in Part II.

## **PART II**

### **CHAPTER 9: CHANGING ATTITUDES, ROLES AND RESPONSIBILITIES**

1. That the Ontario Courts Management Advisory Committee and the eight Regional Courts Management Advisory Committees develop a cohesive structure amongst themselves for purposes of co-ordinating and enhancing their advisory functions across the province.
2. That these Committees be recognized and accepted by the Bench, the Ministry, the Bar and the Public as an important branch of the justice structure in Ontario, and that efforts be made to ensure that their mandate to consider and recommend policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest, be duly carried out.
3. That the practice of inviting representatives of Courts Administration to regional Bench and Bar meetings be extended throughout the province.

### **CHAPTER 10: CREATING A RESPONSIBLE JUSTICE SYSTEM STRUCTURE**

4. That steps be taken immediately to establish a single issue task force -- comprised of representatives of Government, Judiciary, Bar and Public -- mandated to develop an implementable proposal for the creation of a unified

administration, management and budgetary structure for the justice system in Ontario.

Such a structure must have clear lines of responsibility and accountability for all administrative, all financial and budgetary, and all operational matters within the system; and it must possess at least the following minimum characteristics:

1. It must be consistent with, and guarantee, the preservation of an independent judiciary.
2. It will feature a governing body or council which is broadly accountable and representative of the Public, the Judiciary, the Government and the Bar.
3. It will ensure the preservation of an independent judiciary; any decisions affecting the independence of the judiciary will require a majority vote by the judges on the governing body of the new structure.
4. The role of the governing body -- which, as noted, will include government, bar and public representatives as well as judges-- will be primarily of a supervisory and management nature. Day-to-day and direct operational responsibility for the system will be assigned to full time professional court administrators and their staff.
5. The new system must be properly and adequately funded from the outset, in order to preserve the integrity of the justice system. This is essential.
6. The Attorney General and the Chief Judicial Officers of the province should be members of the governing council, to ensure that they are supportive of, and accountable for, representations made to the legislature. As well, the governing body must be provided with the necessary supportive linkage with Treasury Board to enable it to make effective representations to the legislature.
7. The new system must ensure ultimate accountability to the legislature for the expenditure of these public funds, and preferably will feature direct reporting to that body and direct approval by it of budgetary matters.

**CHAPTER 11: THE COST OF THE CIVIL JUSTICE SYSTEM**

5. That a research project be commissioned to examine and analyze the question of the "cost" of justice, both from an institutional or systemic perspective and from the perspective of individual litigants.
6. That a working group be established, in conjunction with the Law Society of Upper Canada, for the purpose of addressing the question of legal fees and making recommendations to the Civil Justice Review in that regard for the purposes of its Final Report.

**CHAPTER 12: BACKLOG**

7. That the notion of "backlog" be confined to those cases which are truly ready for trial and which have been in a state of readiness awaiting trial for a period greater than 9 months.
8. That two dedicated teams -- a trial team, and a pre-trial/settlement team -- be created for purposes of pre-trying and trying, the backlog cases in the court centres around the province where this is needed most.
9. That the backlog trial team be drawn from existing judicial resources.
10. That the pre-trial/settlement team be comprised of a group of recently retired judges and senior members of the bar.
11. That a fund be created for the purpose of retaining a group of recently retired judges, and senior members of the bar if necessary, to act as an advance pre-trial/settlement conference team for the backlog cases. This team would work

with the backlog trial team in developing and carrying out a plan to attack and eliminate the existing backlogs across the province. Its members would pre-try, mini-try, mediate and make all reasonable efforts to settle those cases in order to avoid the need for trials. For those cases which need to be tried, and which cannot be settled, they would conduct trial management conferences in order to prepare the case for as short and effective a trial as possible.

12. That the Federal Government of Canada respond promptly to the occurrence of judicial vacancies by appointing new judges to fill vacancies immediately upon their occurrence.
13. That the Federal Government consider the making of "anticipatory appointments" as a method of temporarily increasing the judicial resources available, in order to create a pool of additional judges for attacking the backlog problems across the province.

## **CHAPTER 13: MANAGEMENT OF CASES**

### **13.1 Caseflow Management Generally**

14. That Ontario adopt general time standards for the disposition of cases in the system from the date of filing. We propose with the following minimum time lines for the completion of standard cases (recognizing that regional and local circumstances may suggest shorter parameters):

From filing to settlement conference -- 9-12 MONTHS

From settlement conference to trial -- 9-12 MONTHS

15. That a caseflow management system, designed to manage the time events of lawsuits as they pass through the civil justice system, be implemented on a province-wide basis in Ontario over a period of the next 4-5 years.

16. That the system will manage the time and events of law suits as they pass through the civil justice system. With both delay prevention and delay reduction in mind, it should seek to achieve the following objectives:
  1. The earlier resolution of disputes, where that is possible;
  2. The prevention, reduction, and eventual elimination, of delays and backlogs;
  3. The allocation of judicial, quasi-judicial and administrative resources to cases in the most effective manner; and,
  4. Reduction of the cost of litigation.
  
17. That the exact nature and form of the system of caseflow management to be introduced across the province be a matter to be left to an implementation team to be created for that purpose.
  
18. That the new model should also include the following key features:
  - Principal responsibility for management of the flow of cases to the judiciary
  - Judicial and administrative teams, including judicial support officers and case management/administrative co-ordinators
  - Screening and evaluation mechanisms to move cases into appropriate streams
  - The processing of cases in accordance with given time parameters, which will be enforced
  - Integration of the various dispute resolution techniques and case management mechanisms into a co-ordinated whole
  - Case conferences (to deal with the logistics and processing of cases), settlement conferences (before which a case will not be listed for trial) and trial management conferences (before which a case will not be given a trial date)



- Training for staff, judiciary and the bar
  - Adequate resources
19. That the implementation of caseload management must be accompanied by:
- a) The support and commitment of the Bench, the Bar and the Ministry, to make it work;
  - b) The necessary technological systems, including computer hardware, computer software and communication networks, and include the training and staff support which are essential to make such technology effective;
  - c) The appropriate level and complement of staff support, including case management co-ordinators, scheduling staff, secretarial and file management staff;
  - d) A willingness on the part of the Judiciary to take responsibility for managing the pace of litigation and to enforce the time parameters set down;
  - e) The appointment of Judicial Support Officers to provide case management and judicial support;
  - f) A strategy to reduce the existing backlogs at the same time as the new system prevents future backlog;
  - g) The completion of an independent resource-needs analysis to determine the appropriate mix and quantities of the ingredients referred to above;
  - h) The articulation of clear goals and standards -- both on a systems wide basis and on the basis of monitoring the rules and time standards of individual cases -- in order to provide benchmarks against which the effectiveness of the system can be measured;
  - i) The development of a detailed operational transition plan to phase in the introduction of case management on a province-wide scale; and, finally,

- j) The creation of an ongoing, periodic review mechanism in order to ensure that the caseload management paradigm is working as well as possible on a continuing basis.

### **13.3 Circuiting**

- 20. That circuiting be recognized as a central feature of the Ontario Court (General Division), and that Judges of that Court be required to circuit between regions, for a number of weeks per year to be determined by the Chief Justice. Judges will move into and out of the "Judicial Teams" to be established throughout the province. Circuiting within regions should take place in the context of the team concept, as directed by the Chief Justice and the Regional Senior Justice.

### **13.5 Alternate Dispute Resolution**

- 21. That educational programs continue to be offered through public and legal organizations to expand the knowledge and acceptability of ADR among the public and the bar.
- 22. That the Law Society proceed to implement the proposals of its Dispute Resolution subcommittee and, in particular, its draft proposal to amend the Rules of Professional Conduct to place a positive obligation on lawyers to inform their clients of alternatives to litigation and to respond to proposals for the use of alternative methods of dispute resolution.
- 23. That standards be developed by the ADR profession, in conjunction with the Law Society of Upper Canada and other appropriate professional organizations, for the accreditation of ADR practitioners who provide service to the public either privately or through court-connected facilities.

24. That the concept of court-connected ADR be accepted in principle, with the determination of the appropriate form of service model and funding option to await the evaluation of the ADR Centre pilot project and, in family matters, the outcome of the family mediation policy discussions presently in progress.
25. That provisions similar to those relating to the Windsor and Toronto case management projects respecting the dismissal of actions in circumstances of default be extended on a province-wide basis; and,
26. That early screening and evaluation mechanisms be built into the caseload management structure to be implemented in the province.

### **13.6 Settlement Conferences**

27. That the concept of "pre-trials" be replaced by two distinct processes, the "settlement conference" and the "trial management conference".
28. That cases not be listed for trial until after a settlement conference has been held and no settlement reached within 30 days of the settlement conference; and,
29. That cases not be assigned trial dates until a trial management conference has been held.
30. That consideration be given to amending the Rules of Civil Procedure to authorize a judge to impose cost sanctions on counsel who unreasonably delay the time of trial beyond the agreed estimated time by their unreasonable conduct of the trial or who have given an unrealistic estimate of the trial time needed at the trial management conference.

### **13.7 Discoveries**

31. That consideration be given, by the Rules Working Group of the Implementation Team, to methods of improving the examination for discovery process in ways that will make it more economically effective while at the same time preserving its essential disclosure principles. Some areas that might bear scrutiny in this exercise are:
- The possible retrenchment of the scope of discovery to pre-1985 limits
  - Removal of the right to cross-examine at discovery
  - Time parameters for the conduct of oral examinations

### **13.8 Motions**

32. That courts be more vigilant in exercising their costs sanctioning authority under the Rules in cases of abuse regarding motions and motions procedures.
33. That limits be placed on the length of written submissions to be filed on motions and applications, such limits to be adhered to unless the court grants an exception;
34. That the Rules Working Group of the Implementation Team examine ways of reducing the volume of paper put before the court on motions and applications; and further,
35. That the Rules Working Group consider the advisability of staggered starting times for Motions and Applications and the practice of "purging the lists" as means of reducing the time and resources attributable to those procedures.

### 13.9 Venue

36. That the Rules of Civil Procedure be amended to provide Senior Regional Justices with the discretionary authority to order, on their own initiative or at the request of one or more of the parties, that a proceeding be transferred from one court centre to another within the same Region. We further recommend that authority extend to the transfer of a proceeding between court centres between Regions, with the concurrence of the Senior Regional Justices of each Region in question.

## CHAPTER 14: THE RULES OF CIVIL PROCEDURE AND THE SIMPLIFIED RULES PROPOSAL

37. That the Courts of Justice Act be amended to provide for the addition of a public representative to the Civil, Family and Criminal Rules Committees.
38. That a working group be established, as part of the implementation team and in conjunction with the Civil and Family Rules Committees, to deal with the Rules changes that will emerge from the recommendations contained throughout this First Report.
39. That the proposal of the Simplified Rules of Civil Procedure Committee with regard to all cases in which the claim is for money or property of a worth not exceeding \$40,000. be adopted.

## **CHAPTER 15: RECORDS MANAGEMENT**

40. That a Working Group be established, as part of the Implementation Team, to review the role of the Court as record keeper and to make recommendations with respect to:
  1. The nature and type of court record that must be preserved;
  2. Time parameters for records that do not require perpetual preservation;
  3. The manner of storage of records that need to be kept;
  4. The manner in which documents which are not required to be kept should be destroyed.

The working group should be comprised of representatives from the Judiciary, Courts Administration, Government Archives and the Bar.

## **CHAPTER 16: FOCUS ON FAMILY LAW**

### **16.2 The Proposal: A Resolution Focused Process for Family Law**

41. That an information services video be prepared with respect to Family Law matters for distribution through community resource centres, shelters, legal aid clinics, the courts and law offices and that, except in emergency situations, it be mandatory for parties contemplating Family Law litigation to view the video prior to instituting court process.
42. That the early session/evaluation process involving the early intervention of judges and a streamlined process be introduced on a pilot project basis in the proposed expanded Unified Family Court sites.



43. That local and regional family law committees, with representatives from the public, the judiciary, courts administration and the bar, be established to enhance communication, knowledge, and the quality of the process in Family Law matters. A parallel provincial committee would assist in providing a communication and coordination function across the province.
44. That the Legal Aid Plan consider the development of legal education programs for lawyers providing Family Law services, in conjunction with the Law Society of Upper Canada and other professional organizations; and that the granting of legal aid certificates to lawyers representing family law clients be contingent upon participation in such programs or upon some other form of accreditation.
45. That administrative, low-cost options for the disposition without judicial involvement of purely uncontested divorces, (excluding issues respecting children) be developed.
46. That serious consideration be given to removing from the Family Support Plan support payors who are in compliance, until there has been a default, and redirecting efforts and resources to customer service issues.

## **CHAPTER 17: SPECIFIC AREAS**

### **17.1 Small Claims**

47. That Small Claims Court proceedings across the province incorporate a standardized settlement conference/pre-trial process, with mediation-like services available as a part of that process where feasible.
48. That lawyers who act as Deputy Small Claims Court Judges receive mandatory training for the performance of their duties, under the direction of the

Committee of the General Division Judges in consultation with the National Judicial Centre. We also recommend that this training include training in mediation. We further recommend that Deputy Judges be compensated, at their per diem rate, while attending such training sessions.

49. That the Courts of Justice Act be amended to provide for appeals from decisions of the Small Claims Court be made to a single judge of the Ontario Court (General Division) sitting in the region where the claim has been disposed of.
50. That the monetary threshold for appeals from final orders in Small Claims Court be established at \$1,200 for the present, and that the threshold be established automatically at 20% of the maximum monetary jurisdiction of the Small Claims Court, as it may be prescribed by regulation from time to time.
51. That consideration be given to establishing an optional procedure for appeals to be presented in writing from final orders of the Small Claims Court.

## **17.2 Landlord and Tenant**

52. That the Ministry of the Attorney General continue to pursue mediation options with the Ministry of Housing.
53. That, if the Supreme Court of Canada holds that it is constitutionally permissible to place landlord and tenant disputes in an administrative setting, such an option for Ontario be re-examined.

54. That a working group consisting of representatives of the Judiciary, the Masters, the Ministry of the Attorney General, the Construction Bar and the Construction Industry be established to review the final report of the Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes and report back to the Review for a recommendation in our Final Report.

#### **17.4 Bankruptcy**

55. That the Registrar and Deputy Registrar in Bankruptcy functions be assigned to the Judicial Support officers working within the case management team concept.
56. That a Judicial Support Officer in each Regional Centre be appointed, under the Bankruptcy and Insolvency Act, to carry out the functions of Deputy Registrar in Bankruptcy in each of these centres.

### **CHAPTER 18: TECHNOLOGY AND STATISTICAL INFORMATION**

#### **18.4 Ontario's Needs**

57. That steps be taken immediately to put in place the necessary technology for the creation of a proper management information system for the civil justice system, and thereafter to implement such a system.
58. That a pilot project be established to test the utility of video conferencing technology in civil matters. We suggest that the project be established amongst a number of communities in Northern Ontario.

## 18.6 Critical Next Steps

60. That the technological infrastructure -- including network systems, hardware equipment, software applications, and provision for adequate training -- be put in place in Ontario to enable the civil justice system to operate on the basis of:
  - the electronic filing of documents by lawyers, by members of the public, and by other agencies
  - the electronic exchange of information as needed between lawyers, offices, the judiciary and the public
  - the ability to provide data in courtrooms and the ability to provide electronic inquiry
  - electronic imaging, to supplement these features
  - video conferencing available provincially for specific types of hearings such as motions and applications, pre-trials and case management meetings
  - data entry at initial source
  - fees paid through automated account debit or credit card
  - automated information centres
  - kiosk access for the public
61. That, as part of the implementation program for this technological infrastructure, the Ministry continue, and expedite, its current initiative in the expansion of network facilities across the Province.
62. That these initiatives be implemented over a period of 5 - 7 years. Planning must include the need for flexibility to accommodate future advances in technology.

63. That a special committee be struck, to work with the Rules Committee in conjunction with the Implementation Plan, to examine these issues and to make recommendations for the implementation of evidentiary and rule changes necessary to accompany the technology changes to be implemented.

## 18.7 Other Recommendations

64. That a Courts Technology Committee be established with a mandate to develop specific proposals for the implementation of technology solutions for the civil justice system. This Committee should be comprised of representatives from the Judiciary, the Ministry of the Attorney General, the Bar and the Public. It should be ready to release its proposals within a period of 9 months. Its terms of reference will include the following:

1. The Committee will determine the optimum solution for the implementation of technology for Ontario's civil justice system, in accordance with the following criteria:
  - the system must be cost effective,
  - it must support the implementation of caseload management,
  - it must provide the infrastructure for a new management information system,
  - it must provide appropriate training opportunities and facilities for users of the system,
  - it must enhance public access to the system,
  - it must ensure the integrity of the court record,
  - it must be responsive to the unique needs of the judiciary,
  - it must be viable into the twenty-first century,
  - It must be able to integrate data and process information from all parts of the system bar, bench, police, corrections and others--while at the same time not threatening the principles of an independent judiciary.
2. The committee will determine the costs of acquiring the necessary technology, and will identify funding opportunities and

develop the necessary business case in support of the required funding.

3. The Committee will work, through a special sub-group, to identify the requirements for an effective management information system, and to develop the means to implement such a system.
4. The Committee will develop a detailed province-wide implementation plan, to be spread over a 5 to 7 year period and will work with the rules committees to ensure that appropriate changes are implemented to the rules so as to ensure that the technological changes will work effectively in practice.

## **CHAPTER 19: RESOURCES**

### **19.2 Efficiencies**

65. That representatives from Courts Administration, the Judiciary and the Bar develop a protocol with respect to the examination of court documents by court staff, and that the protocol be communicated to all court offices in the province and be applied throughout the province.
66. That the Rules Working Group of the Implementation Team consider the development of broader and more flexible approaches to the filing of court documents.
67. That steps be taken, through the Rules Working Group of the Implementation Team, to minimize, and eventually to eliminate, the practice of examinations for discovery being held in court office facilities, in those locations where properly qualified private-sector reporting services are available.



68. That, where there is consent to the order being requested, case management co-ordinators be authorized to dispose of the following matters:
- amendments to pleadings (in addition to the registrar's existing powers in this respect)
  - additions/deletions/substitutions of parties
  - change of solicitors of record
  - setting aside default judgements
  - discharge of certificates of pending litigation
  - requests for security for costs in specific amounts
  - certain discovery related motions

## **19.5 The Impact of Change**

69. That legislators, regulation-makers, rule-makers and authors of practice directions be required to conduct "impact studies" (including research and appropriate consultation) on the effect of proposed changes and initiatives on judicial, administrative and legal resources before implementation of the proposed changes or initiatives.

## **PART III**

### **CHAPTER 20: ACCESS TO INFORMATION AND PLAIN LANGUAGE**

70. That the Ministry of Education, elementary and secondary schools, universities and community colleges play a greater role in the education of the public with respect to the purpose, values and processes of the civil justice system.
71. That community based information services be developed through a

partnership between the Bar, the Ministry and Legal Clinics. The information available should be in "plain language" which is readily understood by general members of the public, and it should be available in a variety of forms -- e.g. written brochures and materials, interactive computer terminals, video cassettes and audio formats -- in order to facilitate a broad distribution of information in locations other than courthouses and at times other than regular office hours.

72. That the Ministry of the Attorney General participate in the Ontario Government's Kiosk Program as a method of disseminating information about legal processes more broadly to the public.
73. That legal forms for use in the General Division be made available at court locations. In connection with this service, we recommend as well the creation of a "plain language" guide to the steps in a legal proceeding along the lines of the presently published Small Claims Court guide.
74. That, as part of the Ministry of the Attorney General's customer service initiative, a guide for counter staff be developed to clarify for them what is permissible information about the legal process for them to impart to the public.
75. That Regional Senior Justices be careful to ensure that local practice directions are put into place after appropriate consultation with bar and courts administration representatives, and in accordance with the provisions of the rules. In addition, copies of the practice direction should be provided to the Regional Courts Management Advisory Committees, to ensure broad publication and knowledge of their contents.

**PART IV****CHAPTER 23: IMPLEMENTATION**

76. That a dedicated Implementation Team be established to work with and assist the Civil Justice Review in developing and executing a plan for the implementation of the recommendations contained in this First Report. The team should be comprised of representatives from the Judiciary, the Bar, the Ministry and the Public.
77. That the Implementation Team function, as well, through sub-working groups which will have responsibility for particular areas of the task and will report to the Implementation Team and the Review itself. Such working groups should be formed to deal with the areas of case management, technology, the rules, and costs, and with such other matters as the Review and the Implementation Team may determine advisable.
78. That the committee which we have recommended be created to examine the issue of an unified management, administration and budgetary model for the justice system should be a separate committee because of its nature.

### CHAPTER 3

## THE HISTORY OF THE ONTARIO COURTS

*...the history of the Ontario courts shows that, with the exception of only a few periods ... [it is] a history of constant change and adaptation. Resistance to change is also a hallmark of the history of the courts. Changes which were considered too radical ever to occur were adopted, almost without a murmur, a few years later. The Ontario courts have survived because they have always adapted themselves to the needs of the people.*

*The Hon. T.G. Zuber<sup>2</sup>*

To serve the needs of the Ontario people, the province's courts have undergone a series of transformations over the past two hundred years.<sup>3</sup>

After the American Revolution in 1777 many United Empire Loyalists moved north to settle in what is now Ontario. These Loyalists were unfamiliar with the civil law system of France which was in effect in their territory and unhappy with the fact that all the courts were far away in the districts of Quebec and Montreal.

To appease the Loyalists, England divided the territories into the predominantly English-speaking district of Upper Canada and the predominantly French-speaking district of Lower Canada, in 1791. English Common Law was applied to all civil and criminal law matters in Upper Canada. The new court system which sprung up in Upper Canada was modeled after the English system, thereby creating the prototype from which Ontario's courts would evolve. Judges of the superior courts began circuiting around Upper Canada, thereby bringing superior court justice to the far reaches of the untamed terrain. In 1837 a court of equity was introduced. By this time, Upper Canada had a fully-functioning judicial system

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<sup>2</sup>Report of the Ontario Courts Inquiry, The Hon. T.G. Zuber, [hereinafter "Zuber Report"].

<sup>3</sup> For a detailed, thorough review of the history of Ontario courts, see the Zuber report at pp. 8-29.

consisting of superior, county, and district courts, a court of equity (called the Court of Chancery), and a small claims court (called Division Court).

In 1867 the British North America Act was passed (now the Constitution Act, 1867), creating a federal system of government for Canada. Sections 96 to 101 of the constitution provided for the division of court powers between federal and provincial governments. Section 96 is of particular relevance to any discussion involving court restructure or the delegation of judicial powers. Section 96 provides that the federal government will appoint judges of the superior, county and district courts. The powers of these federally appointed judges cannot be reassigned to a provincial court. Over the years jurisdictional disputes between courts with federally appointed judges and those with provincially appointed judges have revolved around the interpretation of s.96, with the result that provincially appointed judges have often had their jurisdiction limited. The one notable instance of delegation in these early years following the Constitution Act, 1867 was the permitted delegation of powers by circuiting judges to Clerks of Crown and Pleas of the Court of Queen's Bench; this was the origin of the system of Masters in Ontario.

The common law and equity, and their respective courts, were merged in 1881 pursuant to the Ontario Judicature Act (1881). The new Supreme Court of Ontario was created with two branches: the High Court of Justice and the Court of Appeal. All County Court judges became local judges of the High Court and had jurisdiction to exercise certain of the High Court's powers, to ensure that litigants had access to justice in their own districts and did not have to travel to Toronto to be heard by the High Court. This Act also expanded the powers of Masters by merging the offices of the Clerk of Crown and Pleas, the Master in Ordinary, and the Referee in Chambers.

As early as 1867 it was recognized that a separate court was needed to deal with family law matters. In 1908 legislation was passed which gave discretion to local

authorities to create juvenile courts. Finally, in 1954 legislation standardized juvenile courts by creating the Juvenile and Family Court, and by expanding its jurisdiction to include matters under the Training Schools Act, the Deserted Wives' and Children's Maintenance Act and the Child Welfare Act.

In the late 1960s the province assumed full responsibility for the financing of the administration of justice. This was followed by the reorganization of the provincial courts into the Provincial Courts (Criminal Division) and (Family Division), and the 1970 addition of the Divisional Court to the Supreme Court of Ontario.<sup>4</sup>

Significant changes occurred in the 1980s.

In 1985 the Courts of Justice Act was passed. The Act sought to remove the confusion between the District/County Courts and the Court of General Sessions of the Peace by providing for one Ontario-wide court at that level, called the District Court of Ontario.

In 1989 the Courts of Justice Amendment Act, 1989 was enacted by the Government to create one large superior trial court for Ontario. This Act came into force in 1990 and resulted in the merger of the High Court, the District Court and the Surrogate Court into the Ontario Court of Justice (General Division). The Small Claims Court and the Divisional Court continue as branches of the General Division. The criminal and family divisions of the Provincial Court were merged to form the Ontario Court of Justice (Provincial Division). The Court of Appeal, and the Unified Family Court in Hamilton, continue as separate courts.

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<sup>4</sup>See chapter 17.1 infra on Small Claims Court for an overview of the changes which occurred to it between 1970 and 1985.



The new court structure is described in further detail in the next chapter.

Combined with regionalization -- the division of the Province into 8 juridical regions -- these changes have had a profound affect upon the way in which civil and criminal justice are delivered in Ontario.

## **CHAPTER 4**

### **THE COURTS IN ONTARIO TODAY**

#### **4.1 CURRENT STRUCTURE OF THE ONTARIO'S COURTS**

An outline of Ontario's present Court Structure and its officers follows.

##### **a. Court of Appeal**

The Court of Appeal is the highest court of record in the Province. As the name implies, it hears appeals from the judgments and orders of the lower courts.

The president of the court is Chief Justice of Ontario, presently the Honourable Charles L. Dubin. The Associate Chief Justice of Ontario, presently the Honourable John Morden, is also a member of this court. Fourteen other appellate judges fulfill the Court's complement.

Judges of the Court of Appeal are appointed by the federal Minister of Justice.

##### **b. Ontario Court of Justice**

The Ontario Court of Justice has two divisions, namely the General Division and the Provincial Division.

##### **(i) The General Division of the Ontario Court of Justice**

This court is a merger of the previous High Court, District Court and Surrogate Courts. It continues as a superior court of record with general jurisdiction in all civil and criminal matters.

All civil matters are disposed of in the General Division, with the exception the family law matters that are within the jurisdiction of the Provincial Division. It has sole jurisdiction in divorce cases and in family law matters where there are claims for the division of matrimonial property. It also hears support and custody matters,

generally when these have been included in a claim for divorce or where these claims have been joined to claim seeking a division of marital property. Judges of the General Division adjudicate claims under the Landlord and Tenant Act. They also hear appeals from the decisions of judges of Provincial Division in summary conviction matters.

While not the area with which the Civil Justice Review is concerned, the General Division is as well the superior trial court with general jurisdiction in criminal matters, and it hears all criminal cases that are tried before a judge and a jury.

There are three branches of the General Division:

The Divisional Court:

The Divisional Court hears appeals from some judgments and orders of judges of the General Division and it reviews or hears appeals from decisions of administrative tribunals. It also hears all appeals from Small Claims Court judgments where the amount in issue exceeds \$500.00

The Small Claims Court:

The Small Claims Court has jurisdiction in civil matters where the amount in issue does not exceed \$6,000.00 exclusive of interest and costs. The monetary jurisdiction of this court is fixed by regulation.

The Unified Family Court ("UFC"):

The Unified Family Court began as a pilot project in Hamilton, in 1977. It has complete jurisdiction over all family law matters in its area, including those matters currently within the jurisdiction of judges of the Provincial Division and the General Division. The provincial government has recently introduced legislation under Bill 36 which would allow for the expansion of this court across the province. It will be a branch of the Ontario Court (General Division) known as the Family Court.

### Judicial Officers of the Court

#### **General Division:**

The General Division consists of the Chief Justice of the Ontario Court of Justice, currently the Hon. R. Roy McMurtry; the Associate Chief Justice of the Ontario Court of Justice, currently the Honourable Patrick J. Lesage; 8 Regional Senior Judges; a Senior Judge of the Unified Family Court; and such number of judges as is fixed by provincial regulation. The current complement of judges is fixed at 197 judges excluding the Chief Justice, the Associate, the Regional Senior Judges and the Senior Judge of the Unified Family Court. In addition there are presently 45 supernumerary judges.<sup>5</sup>

General Division Judges are federally appointed with the exception of the remaining Provincial Judges who sit in the Small Claims Court.

### Divisional Court

The Divisional Court consists of the Chief Justice of the Ontario Court of Justice, who is president of the court, and such other judges of the General Division as the Chief Justice designates from time to time.

### Small Claims Court

The majority of Small Claims Court matters are heard by deputy judges, lawyers who have been appointed for a period of three years by the Regional Senior Justice to hear these types of cases. As result of court reform, no new full time judges have been appointed by the provincial government to preside in Small Claims Court.

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<sup>5</sup>A supernumerary judge is one who has the option at age 65 to retire but who elects instead to sit 1/2 of the time of a full-time judge. Supernumerary judges receive full salary, but no pension.

### The Unified Family Court

The Unified Family Court is presided over by a Senior Judge of the General Division for the Unified Family Court. There are currently 5 judges (and 1 supernumerary judge of this court. Under Bill 136, the Family Court will consist of the Chief Justice of the Ontario Court, the Associate Chief Justice (Family Court) the Senior Judge of the General Division for the Unified Family Court, and such judges as are prescribed by statute, appointed, or assigned.

### Masters

There are currently 8 full-time and 6 retired but active Masters, who have jurisdiction conferred by the rules of the court in proceedings in the General Division. Masters are authorized to hear most pre-trial procedural questions and, as well, deal with specialized matters such as construction liens and bankruptcy. They also conduct assessments of solicitors fees and accounts. Masters are appointed by the provincial government. As a result of court reform, the power to appoint new Masters was removed.

#### **(ii) The Provincial Division of the Ontario Court of Justice:**

Prior to court Reform, this court was known as the Provincial Court with three divisions; criminal, family and civil. When Court Reform was implemented, the civil jurisdiction was reconstituted as a branch of the General Division and the criminal and family law divisions were merged. This court's jurisdiction in civil matters is now limited to claims for custody and support where there is no claim for divorce nor any claim for division of marital property. The Provincial Division has sole jurisdiction in adoption, child welfare and protection matters, and in young offender cases.

### Judicial Officers of this Court

The Provincial Division consists of the Chief Judge of the Provincial Division, presently the Hon. Sidney B. Linden, two Associate Chief Judges, a Regional Senior Judge for each of the 8 regions and such number judges as are appointed by the

provincial government . The judicial complement of the court is not fixed by law. Judges now appointed to the Provincial Division can be scheduled by their Regional Senior Judge to hear both criminal and family law matters.

There are currently 250 judges of the Provincial Division.

There is also a coordinator for Justices of the Peace and a number of full and part-time justices of the peace who have no jurisdiction in civil matters.

### **c. Agencies, Boards and Commissions**

In addition to the courts, the **1994 Guide to Agencies, Boards and Commissions** lists approximately 450 administrative decision-makers.

Members of these tribunals are appointed by the provincial government. They generally determine claims or benefits under various legislative schemes or make decisions regulating the conduct of individuals and corporations. Among the better known of these types of tribunals are those dealing with labour relations, employment law and municipal and planning matters.

Since 1992, a Management Board Agency Reform group has been reviewing the management of agencies, boards and commissions and a separate Task Group was established to deal with a number issues relating to such agencies.

### **d. Administration of the Courts**

The provincial Attorney General superintends all matters connected with the administration of the courts, other than matters assigned by law to the judiciary. The Ministry of the Attorney General, through its courts Administration Division, provides administrative support services, personnel and facilities to the court system in Ontario. The division manages more than 235 court offices across the province which act as the nexus between litigants counsel, the police, the judiciary, the Crown and



other agencies. It serves as the main link between the Ministry and the Judiciary and provides support services to federally and provincially appointed judges.

In addition, the Courts Administration monitors and enforces support and custody orders issued by the court through its Family Support Plan. It supports regional operations through the coordination of program policy, operational and resource planning, and the development of improved operational procedures, systems and service-level standards.

**e. Regionalization of the Judiciary and Courts Administration**

On September 1, 1990, Court Reform also established a regional structure for the court system. Eight Regions were created in the Province. The judiciary, courts administration and crown attorneys were regionalized: Regionalization had been recommended by the Hon. Thomas Zuber in the Report of the Ontario Courts Inquiry of 1987.

The eight regions and included counties, districts and regional municipalities are illustrated on the following map.

**f. The Ontario Courts Management Advisory Committee and the Regional Courts Management Advisory Committees**

The operation of the justice system needs to be a shared responsibility between the independent Judiciary, the Ministry of the Attorney General, the Bar and the Public. With a view to ensuring broader advisory and consultation mechanisms at a time of increased demands and constrained resources, the Courts of Justice Act amendments created Ontario and Regional Courts Management Advisory Committees. These committees bring together representatives of the judiciary, bar, ministry and general public. The function of the Committees is to consider and to recommend to the relevant bodies or authorities policies and procedures for the region to promote the better administration of justice and the effective use of human and other resources in the public interest.

NORTHWEST REGION

# PROVINCE OF ONTARIO

## NORTHWEST REGION

1. Kenora
2. Rainy River
3. Thunder Bay

## NORTHEAST REGION

4. Cochrane
5. Algoma
6. Sudbury
7. Timiskaming
8. Parry Sound
9. Nipissing
10. Manitoulin

## EAST REGION

11. Renfrew
12. Hastings
13. Prince Edward
14. Lennox & Addington
15. Frontenac
16. Lanark
17. Leeds
18. Ottawa-Carleton
19. Grenville
20. Dundas
21. Russell
22. Stormont
23. Prescott
24. Glengary

## CENTRAL EAST REGION

25. Muskoka
26. Haliburton
27. Simcoe
28. Victoria
29. Peterborough
30. York Region
31. Durham
32. Northumberland

## TORONTO REGION

33. Metropolitan Toronto

## CENTRAL WEST REGION

34. Bruce
35. Grey
36. Dufferin
37. Wellington
38. Peel
39. Halton

## SOUTHWEST REGION

40. Huron
41. Perth
42. Lambton
43. Middlesex
44. Oxford
45. Elgin
46. Kent
47. Essex

## CENTRAL SOUTH REGION

48. Waterloo
49. Brant
50. Hamilton-Wentworth
51. Haldimand-Norfolk
52. Niagara

NORTHEAST REGION

EAST REGION

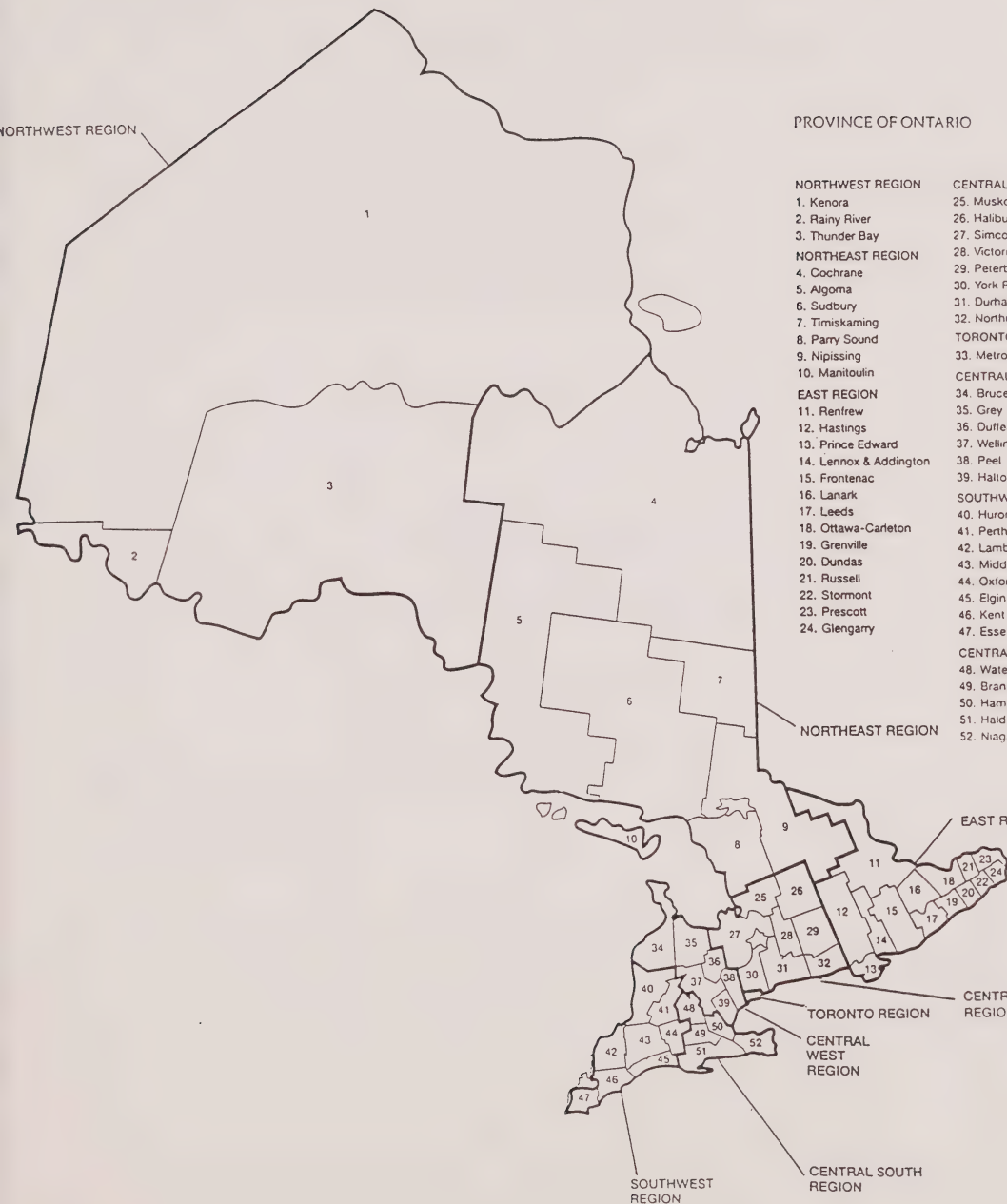
TORONTO REGION

CENTRAL WEST REGION

CENTRAL EAST REGION

SOUTHWEST REGION

CENTRAL SOUTH REGION



## CHAPTER 4.2

### THE PRESENT COURT PROCESS

The various phases and steps in a lawsuit can be complicated and confusing. Without endeavouring to set those out in detail, we include the following table to provide a summary for those who may find it helpful. The table describes the steps to be taken, the court administration (and, in some cases, judicial) steps accompanying them, and the fees involved.

The Step	Court Office	Fees
<ul style="list-style-type: none"><li>• Attend court to have the proceeding commenced</li><li>• a statement of claim or notice of action (prepared by party in advance) issued</li></ul>	<ul style="list-style-type: none"><li>• staff reviews document for compliance with the rules of civil procedure before issuance</li><li>• document is sealed, assigned a number, and a file is created</li><li>• a manual procedure card is created to record the events in a case</li><li>• some statistics are also recorded</li></ul>	<ul style="list-style-type: none"><li>• \$125</li><li>• fee is deposited to a revenue account and remitted to the Consolidated Revenue Fund</li></ul>
<ul style="list-style-type: none"><li>• Serve the defendant within 6 months of issuance of the statement of claim or notice of action</li></ul>		<ul style="list-style-type: none"><li>• \$40.00 per service + kilometre allowance if process server used</li></ul>
<ul style="list-style-type: none"><li>• defendant files statement of defence within 20 days after service of the claim</li></ul>	<ul style="list-style-type: none"><li>• court files statement of defence</li></ul>	<ul style="list-style-type: none"><li>• \$70.00</li></ul>

The Step	Court Office	Fees
<ul style="list-style-type: none"> <li>• party may make a <u>motion</u> to the court to seek an order from the court pending the final outcome at trial</li> <li>• each party must prepare a motion record and serve the opposing side</li> <li>• notice of motion setting out relief sought</li> <li>• affidavit evidence</li> <li>• documentary exhibits</li> </ul>	<ul style="list-style-type: none"> <li>• court files motion materials</li> <li>• hearing of the motion is coordinated by the court staff, under the direction of the judiciary, who are responsible for scheduling motions and for the assignment of judges to these motions</li> <li>• ensure, the motion records are before the court</li> <li>• in the interim the parties may contact court staff for information</li> <li>• court staff may retrieve files in response to inquiries from parties and provide information to them</li> <li>• court may receive other funds, which are held in separate trust accounts on behalf of litigants pending the disposition of the case</li> <li>• financial records for revenue and trust accounts are maintained and reports are submitted on a monthly basis</li> </ul>	<ul style="list-style-type: none"> <li>• \$45.00 fee paid by moving party</li> </ul>
<ul style="list-style-type: none"> <li>• Discovery - documentary disclosure and oral examination of parties, under oath, before the trial</li> </ul>	<ul style="list-style-type: none"> <li>• oral examination may be done before an official examiner</li> </ul>	<ul style="list-style-type: none"> <li>• \$9.00 for each person examined</li> <li>• \$15.00 per hour for provision of facilities</li> <li>• \$18.50 per hour for reporters attendance</li> </ul>
<ul style="list-style-type: none"> <li>• transcript of discovery</li> </ul>		<ul style="list-style-type: none"> <li>• \$3.75 per page for the first copy</li> </ul>

The Step	Court Office	Fees
<ul style="list-style-type: none"> <li>• Setting action down for trial</li> <li>• when a party is ready for trial, after the close of pleadings and where the party is not in default, the party can place the case on list of cases waiting to be reached for trial</li> </ul>	<ul style="list-style-type: none"> <li>• file trial record with proof of service</li> <li>• trial record contains the pleadings and any orders relating to the trial</li> <li>• trial record duplicates documents which are already in the file but eliminates all others that may not be required</li> <li>• ready cases go on a trial list and the court then proceeds on the basis of oldest cases being dealt with first</li> </ul>	<ul style="list-style-type: none"> <li>• \$255.00 paid by requesting party</li> </ul>
<ul style="list-style-type: none"> <li>• motion/application hearing by a judge</li> </ul>	<ul style="list-style-type: none"> <li>• the judiciary are solely responsible for the scheduling of cases and for the assignment of judges to hear those cases</li> <li>• court staff will then coordinate the availability of judiciary, counsel, courtrooms</li> <li>• counsel will ensure attendance of witnesses and litigants</li> </ul>	
<ul style="list-style-type: none"> <li>• sittings</li> </ul>	<ul style="list-style-type: none"> <li>• civil cases will have designated sittings of fixed periods of time</li> <li>• most courts arrange an assignment court to determine which cases on the list can be scheduled for the available time period</li> </ul>	
<ul style="list-style-type: none"> <li>• summons of witnesses</li> </ul>	<ul style="list-style-type: none"> <li>• court will issue the summons for a witness if one is required</li> </ul>	<ul style="list-style-type: none"> <li>• \$17.00 per summons</li> <li>• a further fee may be paid if service is required</li> </ul>

The Step	Court Office	Fees
<ul style="list-style-type: none"> <li>• pre-trial</li> </ul>	<ul style="list-style-type: none"> <li>• scheduled before a judge other than the one assigned to hear the case</li> <li>• provides pre-trial judge with pre-trial memoranda prepared by parties, which outlines parties' positions and arguments</li> <li>• individual litigants are generally not present at the pre-trial</li> </ul>	
<ul style="list-style-type: none"> <li>• trial</li> </ul>	<ul style="list-style-type: none"> <li>• a judge presides over the court</li> <li>• a court clerk will call the cases, maintain the documents, assume control of exhibits and swear in witnesses</li> <li>• an official record of the proceeding is kept so that a transcript can be prepared should one be required</li> <li>• one or more court officers are present to escort and assist the judge, to assist the witnesses, and assist in maintaining decorum in the courtroom</li> </ul>	
<ul style="list-style-type: none"> <li>• judgment</li> </ul>	<ul style="list-style-type: none"> <li>• formal judgment is prepared and approved by counsel, and issued by the court</li> </ul>	
<ul style="list-style-type: none"> <li>• enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• if party wants to enforce, an enforcing document (writ of execution) must be obtained from court upon payment of a fee - court issues the writ of execution or other enforcement document - party files it with enforcement office</li> <li>• an office within the court operation will enforce the judgment at the request of the party</li> </ul>	<ul style="list-style-type: none"> <li>• Fees range from \$45.00 to \$155.00</li> </ul>
<ul style="list-style-type: none"> <li>• appeals of final or interlocutory judgments</li> </ul>	<ul style="list-style-type: none"> <li>• originating court assembles relevant file material and forwards this to the appellate court; counsel arrange to have the transcript (where applicable) sent to the appellate court; originating court receives documents when the appeal is disposed of</li> </ul>	<ul style="list-style-type: none"> <li>• \$125.00</li> </ul>



## **CHAPTER 4.3**

### **BUILDING PRESSURES AND TRENDS**

#### **THE BACKLOG**

Cost and delay are the two central issues which have arisen during the Civil Justice Review's deliberations. They underly most of the themes that will be developed throughout this First Report.

"Backlog" is the most visible manifestation of delay -- and its accompanying costs -- in the system.

We deal with backlog, and our proposals for attacking it, separately, in Chapter 12. There, we point out the difference between the time it takes a case to get to trial from when it is started, and "backlog" as we have defined it. "Backlog" is a term more accurately used for purposes of analysing and managing the load of cases waiting to be tried in the system. We have defined it as those cases ready and waiting to be tried, but not reached for trial within 9 months of being placed on the trial list.

From the public's perspective it is the delay from start to finish which is important. That delay is the subject of our overall Report.

Data is not currently captured in a fashion which enables us to provide information on a 9 month aging basis. However, 8 month and 12 month aging statistics are generated by the Courts Information Statistical System ("CISS"). There are presently 23,303 cases on the pending trial lists in the General Division throughout Ontario. Of those cases, 56.71% (13,216) have been on the pending list for more than 12 months; 69.15% (16,115) for more than 8 months. Chart 1 provides a breakdown on a Regional and province-wide basis. This is a heavy caseload. Within these Regions there are localities where the backlog of cases is particularly severe -- indeed, at crisis or approaching crisis proportions. We have noted these communities earlier. They are Windsor, Brampton, Toronto, Newmarket, Whitby and Ottawa.

CHART 1

ONTARIO COURT (GENERAL DIVISION)						
AGE OF CIVIL PENDING CASELOADS ON TRIAL LISTS						
AS OF DECEMBER 31, 1994						
	Under 8 Months Old		8-12 Months Old		Over 12 Months old	Total
	#	%	#	%	#	%
CENTRAL EAST	777	28.91%	271	10.08%	1640	61.01%
						2,688.00
CENTRAL SOUTH	1042	59.95%	317	18.24%	379	21.81%
						1,738.00
CENTRAL WEST	709	59.63%	203	17.07%	277	23.30%
						1,189.00
EAST	752	32.50%	299	12.92%	1263	54.58%
						2,314.00
NORTH EAST	488	45.65%	198	18.52%	383	35.83%
						1,069.00
NORTH WEST	63	88.73%	3	4.23%	5	7.04%
						71.00
SOUTH WEST	1248	24.54%	418	8.22%	3420	67.24%
						5,086.00
TORONTO	2109	23.06%	1190	13.01%	5849	63.94%
						9148
PROVINCE	7188	30.85%	2899	12.44%	13216	56.71%
						23,303.00
SOURCE: CISS DATA						
TORONTO FIGURES HAVE BEEN ADJUSTED DUE TO CISS DATA INACCURACIES						

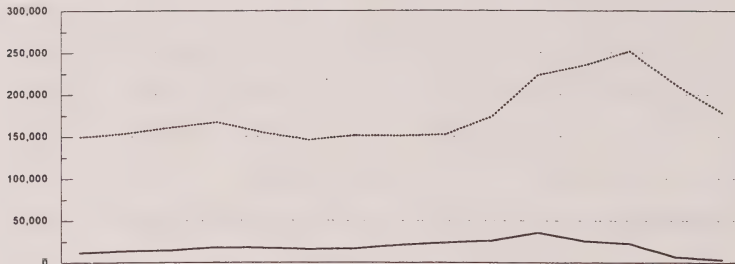
How did this glut of cases develop ? Undoubtedly there are numerous factors that contributed to the genesis and growth of the problem. A striking factor is illustrated by the 15 year trend in Chart 2 which follows. It shows there was a truly massive increase in the number of civil cases entering the system during the late 1980's and early 1990's. Between March 1986 and March 1992 the number of such proceedings initiated annually in Ontario rose from 150,000 to 252,000, a startling jump of 68%.

Chart 2 shows the combined caseload of the District Court and the High Court prior to merger, and of the General Division after merger. Cases initiated remained relatively steady in the 10 years preceeding 1987. They then shot up to their peak in 1991/92, after which they have declined steadily again to approximately 179,000 at the end of 1993/94.

Chart 2

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION  
PROCEEDINGS INITIATED  
15 YEAR TREND**

Proceedings Initiated



	1979/80	1980/81	1981/82	1982/83	1983/84	1984/85	1985/86	1986/87	1987/88	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94
MV	11,736	13,900	14,975	16,224	17,643	16,011	16,842	20,974	24,075	26,394	35,874	26,060	22,930	7,032	3,651
All Actions	149,789	153,933	161,013	167,257	155,063	146,264	151,529	151,192	152,608	173,962	223,406	235,080	252,062	212,153	178,770

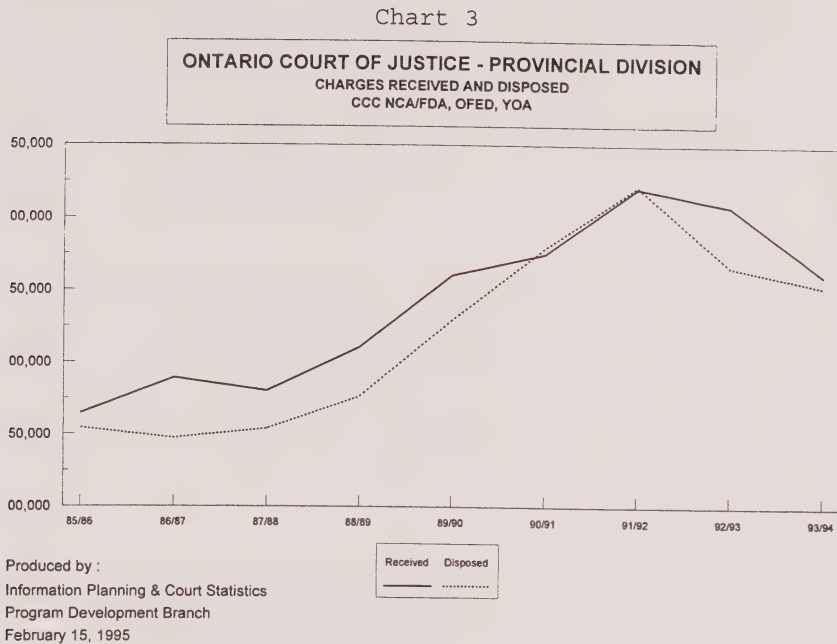
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"All Actions" include : Claims FL/CL, Other, MV  
& Applications : FL/CL, Other, Divorce,  
Estate & Landlord and Tenant Matters

Of comparable significance, in terms of building pressures on the courts, is the experience on the criminal side of the justice system. Between 1985/86 and 1991/92 the total number of charges received into the system province-wide escalated from approximately 460,000 to approximately 625,000 -- a rise of almost 36%. These proceedings all enter the system through the Provincial Division. Those in which the accused elects to be tried by a judge alone or by a judge and jury ultimately find their way to the General Division. What this phenomenon indicates overall, however, is that there was a similarly rapid increase in the number of criminal cases coming into the courts as there was in the number of civil proceedings being initiated, during the period between the mid-1980's and early 1992. The system as a whole was absorbing a double impact.

Like the civil cases, however, the number of criminal proceedings initiated peaked in 1991/92 and has been declining since. This number is expected to be about 550,000 by the end of 1994/95 (i.e. March 31, 1995).

Chart 3 traces the pattern of criminal charges received and disposed of in the Provincial Division between 1985/86 and 1994/95.



There are some harbingers of cautious optimism, however. One, of course, is the steady decline in cases coming into the General Division since 1991/92, although whether this apparent trend will be long term remains to be seen. There are other factors afoot, as well. Co-ordinated efforts involving the Bar, the judiciary and court administrators are being made across the Province to attack existing backlogs. These come at a time when courtroom utilization has been increasing dramatically and when the number of cases entering the system on the criminal side -- as a result of the Government's "Criminal Investment Strategy" -- may be declining also. Towards the end of 1993 the General Division province-wide crossed that important "Rubicon" and began disposing at trial (and through settlements at trial) of more civil cases than are being added to the pending trial lists.

## DECLINE IN PROCEEDINGS INITIATED

There has been a marked decline in the number of cases entering both the civil and criminal systems in the past two or three years. We will return later in this Chapter to some considerations of the criminal experience and of the Ontario Government's response to the Martin Report, often referred to as the Criminal Investment Strategy, in the context of the civil justice system.

In civil matters, Chart 2 above indicates a drop from about 252,000 cases being initiated annually, at the conclusion of fiscal year 1991/92, to approximately 179,000 at the end of 1993/94<sup>6</sup>. About 25% of that decline can be explained by the decrease in the number of motor vehicle claims commenced during the same period. There is no clear explanation for the balance of the decline, although one might speculate that there is a connection with the recessionary economy of the early 1990's.

The decision of the Ontario Legislature a number of years ago to limit the right of people to sue for damages in motor vehicle accident cases, in exchange for enhanced "no fault" benefits has had a significant impact on the number of proceedings initiated in the General Division. For accidents occurring after June 1, 1990, a claim could not be asserted in court unless the plaintiff's injuries surpassed what is popularly referred to as a very high "threshold test"<sup>7</sup>. As a result of this new legislative scheme, the number of motor vehicle cases initiated annually has plummeted from 35,874 in 1989/90 to 3,651 in 1993/94.<sup>8</sup>

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<sup>6</sup> The exact figures, according to the CISS statistics, are 252,062 and 178,770, respectively.

<sup>7</sup> In *Meyer v. Betel et al.* (1993) 15 O.R. (2d) 129 the Ontario Court of Appeal noted that it was inaccurate and misleading to describe the limiting provisions of the legislation (section 226 of the *Insurance Act* R.S.O. 1990, c. l.8) as creating a "threshold", but they are commonly referred to in those terms. See *Meyer v. Betel* for a description and consideration of the no-fault scheme and for an analysis of the requirements that need to be met in order for a plaintiff to be able to sue under the 1990 amendments.

<sup>8</sup> See Chart 2 above for the pattern of motor vehicle litigation since 1979/80.



This is not the end of the tale, however, because in 1993 the legislation was amended again -- for accidents occurring after January 1, 1994 -- to make it easier for people to sue. While the principles of the Ontario Motorist's Protection Plan remained intact, injuries need no longer be permanent, and they need no longer be physical before injured parties may have recourse to the courts. The likelihood that this change will result in new pressures on the courts from motor vehicle litigation is significant. To the extent, then, that the downward trend in cases coming into the civil system is attributed to the "removal" of motor vehicle litigation from the courts, it is dubious whether that portion of the decline will be maintained.

A comparison of the 15 year trend for motor vehicle cases, and the 15 year trend for all cases, indicates, however, that the former are responsible for only a portion of the rise and decline of the entry load in the civil system. If that rise and decline is economy driven -- as might be suggested by the sharp increase during the "economically hot" later 1980's and the "economically recessionary" early 1990's -- it is difficult to predict in what direction the trend line may turn next.

It needs also to be noted that a reduction in the number of cases coming into the system does not necessarily translate into less workload for the courts -- cases are becoming longer and more complex -- but it does ease the significant entry-level administrative burden on court staff and officials.

What it does, as well, is create a potential "breathing space" for the courts as the smaller number of cases work their way through the system. This breathing space should, in turn, help to free up resources for reallocation in ways that can lead to effective structural change.

## **INCREASED COURT HOURS**

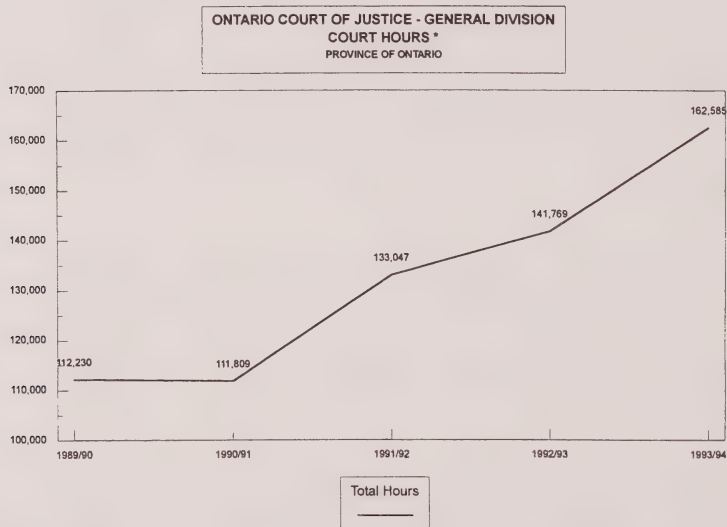
Ministry data indicates there has been a dramatic increase in General Division court hours over the past 5 years. The amount of courtroom time devoted to civil and criminal



trials, pre-trials and motions has risen from 112,230 hours in 1989/90 to 162,585 hours in 1993/94 -- an approximate 45% jump. There has been a 30% increase in hours devoted to civil trials and a 35% increase in hours devoted to criminal trials. Courtroom time attributed to motions and to pre-trials has escalated by 69% and 140%, respectively.<sup>9</sup>

The following three charts, produced by the Information Planning and Court Statistics ("IP&CS") branch of the Ministry of the Attorney General illustrate the foregoing developments.

Chart 4

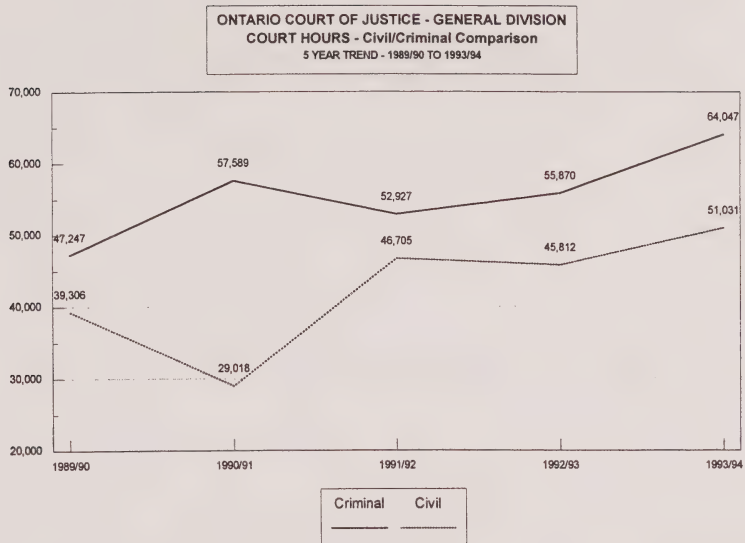


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Note:  
90/91 data incomplete  
\* Includes Motion, Pretrial, Civil & Criminal Court Hours

<sup>9</sup>Although Ministry data for pre-trials and motions does not separate criminal and civil matters, it is reasonable to assume that the majority of time spent on motions would relate to civil matters. Courtroom utilization data is only recently beginning to capture pre-trials and case management type motions that take place in judges chambers. Consequently the information given for motions and pre-trials is understated by that unknown factor. We note that this data is a reflection of "courtroom" time, not of "judge time", as it does not reflect the amount of time spent by the judiciary outside of the courtroom reviewing evidence, reading law, writing decisions and meeting with counsel and parties to attempt to facilitate settlements.

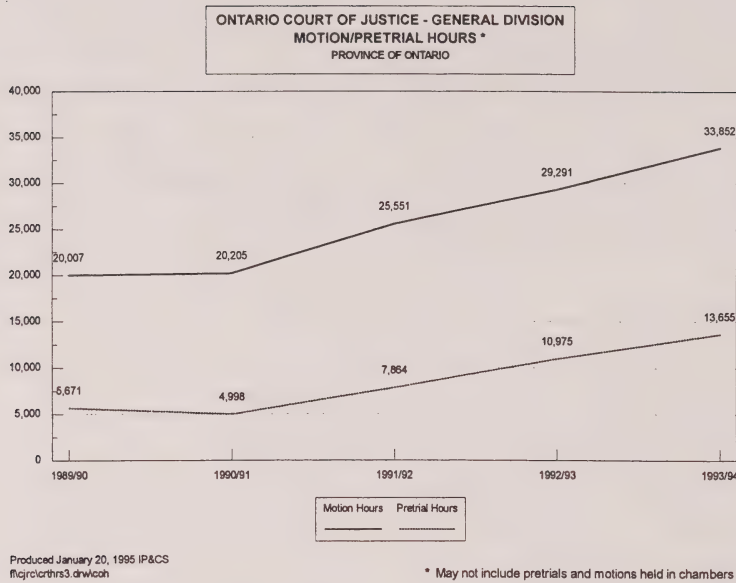
Chart 5



Produced February 7, 1995 IP&CS  
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Note :  
Civil/Criminal hours exclude motions & pretrials  
90/91 data incomplete

Chart 6



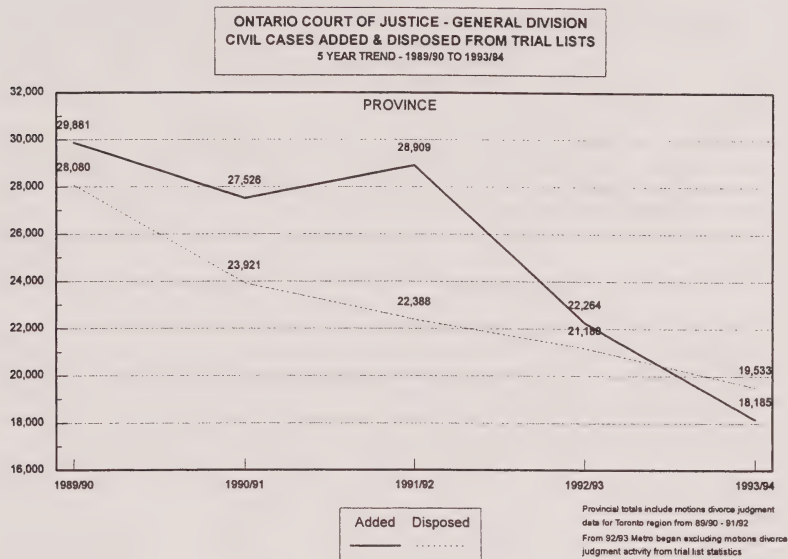
The judiciary and court administrators are making increasingly effective use of available courtroom space.

## DISPOSITION OF CASES

In conjunction with the declining number of cases entering the system and the increased utilization of courtroom hours, there is another factor in assessing trends and the Court's current workload environment: somewhere around the end of 1993 the General Division began to dispose of more cases at trial (and through settlements at trial) than were being added to the list, on a province-wide basis. This is significant because, in conjunction with the other factors mentioned -- and other things being equal -- it means that the Court overall may have an opportunity to "catch up" and to start to reduce the backlog of cases.

Chart 7 illustrates the trend with respect to cases added to, and disposed of from, the General Division trial list province-wide, between 1989/90 and 1993/94.

Chart 7



It is noteworthy that since the end of fiscal year 1991/92 (i.e. March 31, 1992) there has been marked decline in the number of cases being added to the trial lists, and that in general since 1989/90 there has been a decline in the number of cases being disposed of at trial (i.e. by trial and through the settlement of cases at trial). The first of these phenomenon is puzzling, as the downturn coincides with the beginning of the downturn in proceedings initiated, whereas one would have expected there to have been some "lag time" before the initial decline began to affect the trial lists. The second, in conjunction with the dramatic increase in courtroom utilization time, would appear to lend credence to the belief that civil trials are becoming longer and more complex.

The overall provincial totals with respect to cases disposed of and cases added should not be allowed to disguise the fact that there continue to be serious problems in some

Regions and court centres in the Province. In the East and Central East Regions, the Court is still disposing of fewer cases than are being added to the lists; backlogs are mushrooming in Ottawa, Newmarket and Whitby. Other Regions have serious backlog problems in individual court centres -- Brampton and Windsor, for example -- even though regional totals demonstrate regional success in disposing of more cases than are added to the lists.

Charts 8 (a) through 8 (h) show the 5-year trends with respect to cases added to, and disposed from, the trial lists on a Region by Region basis:

Chart 8 (a)

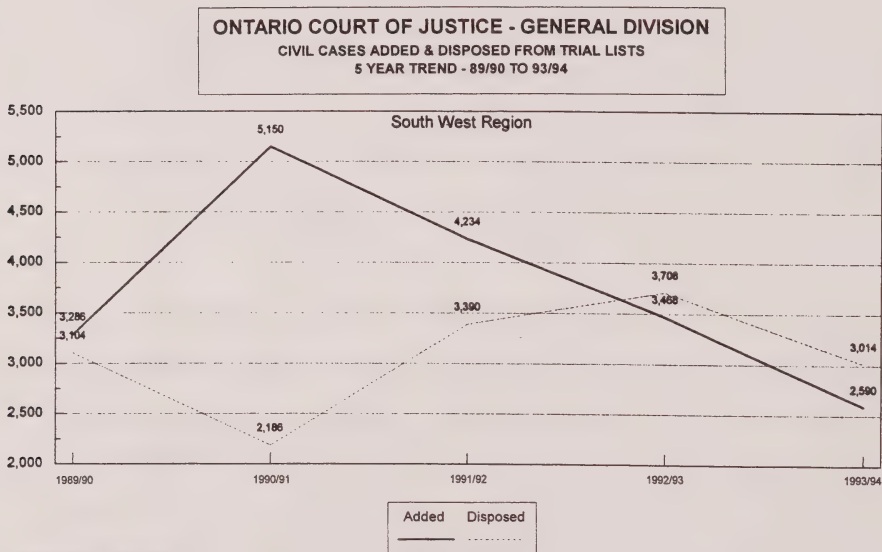


Chart 8(b)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS**  
**5 YEAR TREND - 89/90 TO 93/94**

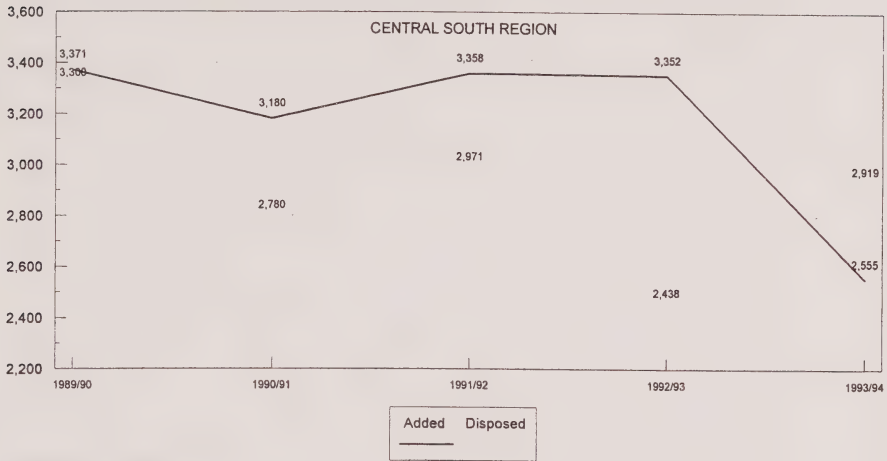


Chart 8(c)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS**  
**5 YEAR TREND - 89/90 TO 93/94**

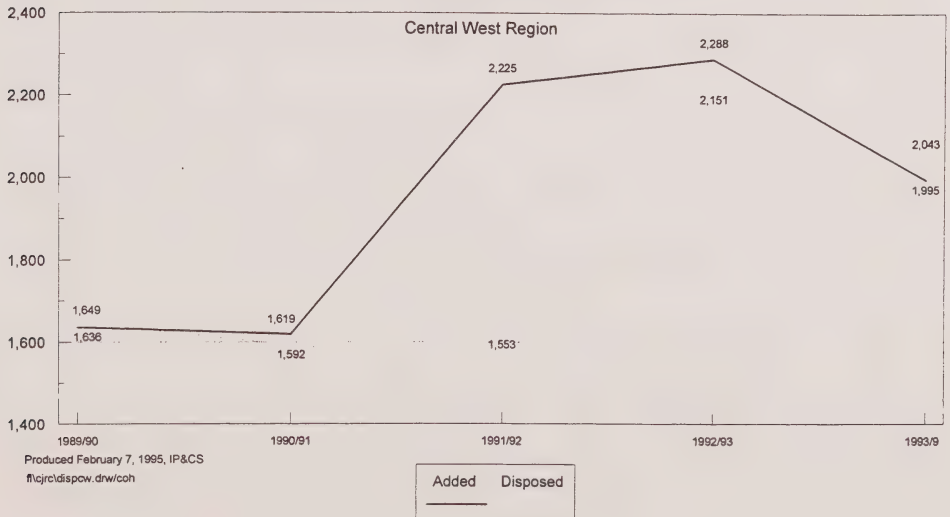
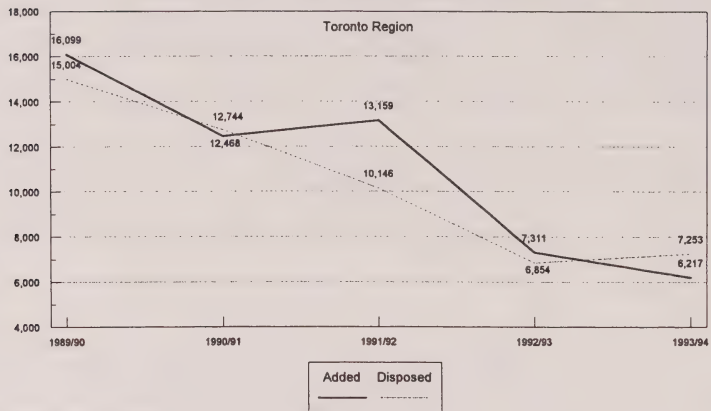




Chart 8(d)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
 CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS  
 5 YEAR TREND - 89/90 TO 93/94



Note :  
 Totals exclude Construction Lien and  
 PLACURA data for 89/90

Chart 8(e)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
 CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS  
 5 YEAR TREND 89/90 TO 93/94

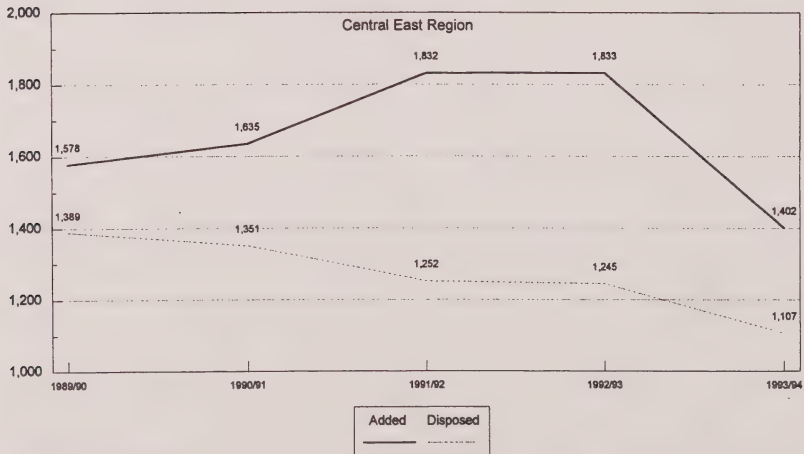


Chart 8(f)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS**  
**5 YEAR TREND - 89/90 TO 93/94**

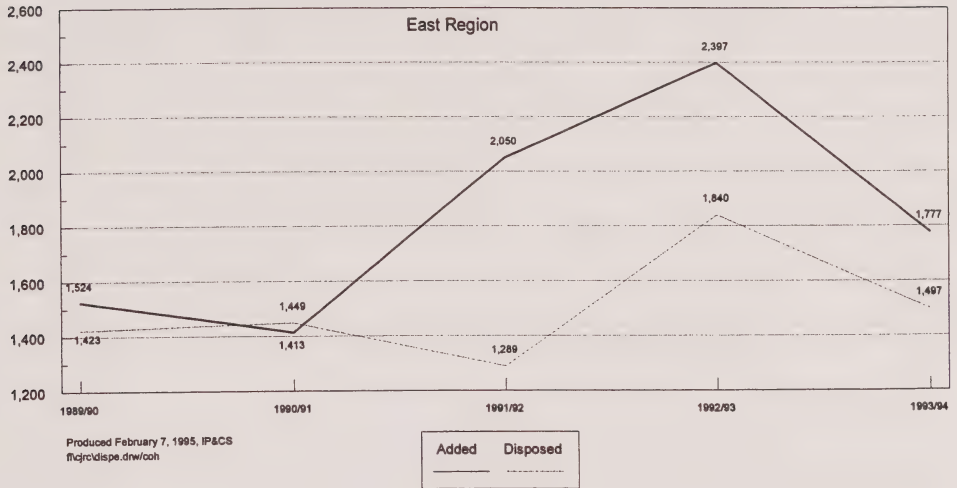


Chart 8(g)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS**  
**5 YEAR TREND - 89/90 TO 93/94**

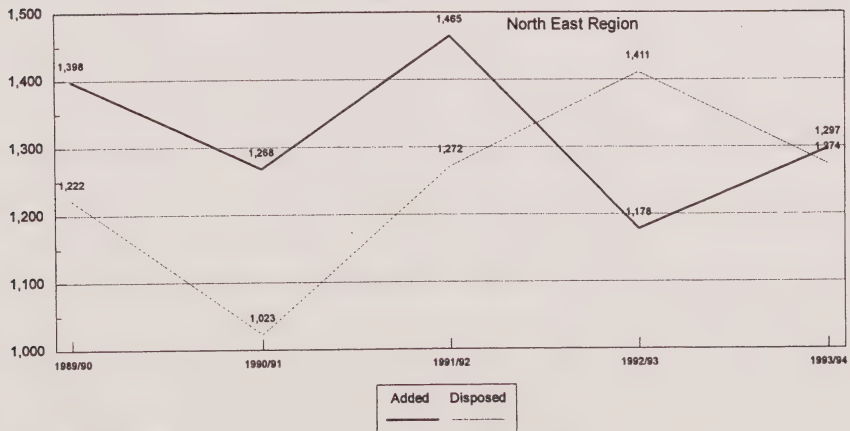
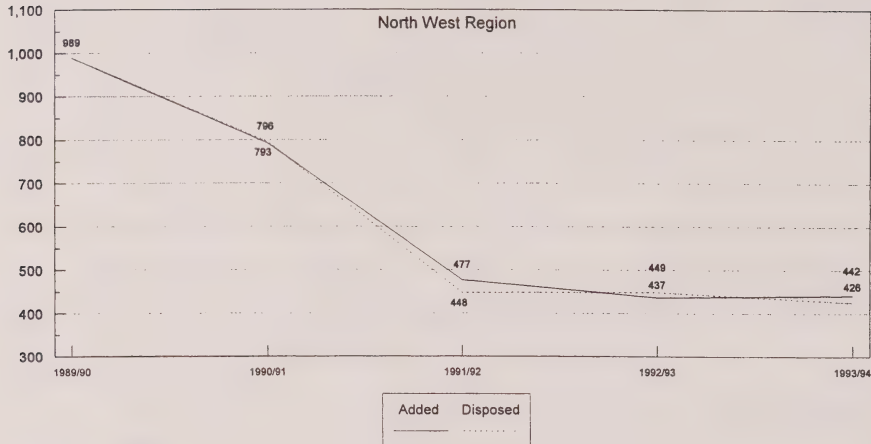


Chart 8 (h)

**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**CIVIL CASES ADDED & DISPOSED FROM TRIAL LISTS**  
**5 YEAR TREND - 89/90 TO 93/94**



## OTHER INFLUENCES: MOTIONS, PRE-TRIALS, AND LANDLORD & TENANT

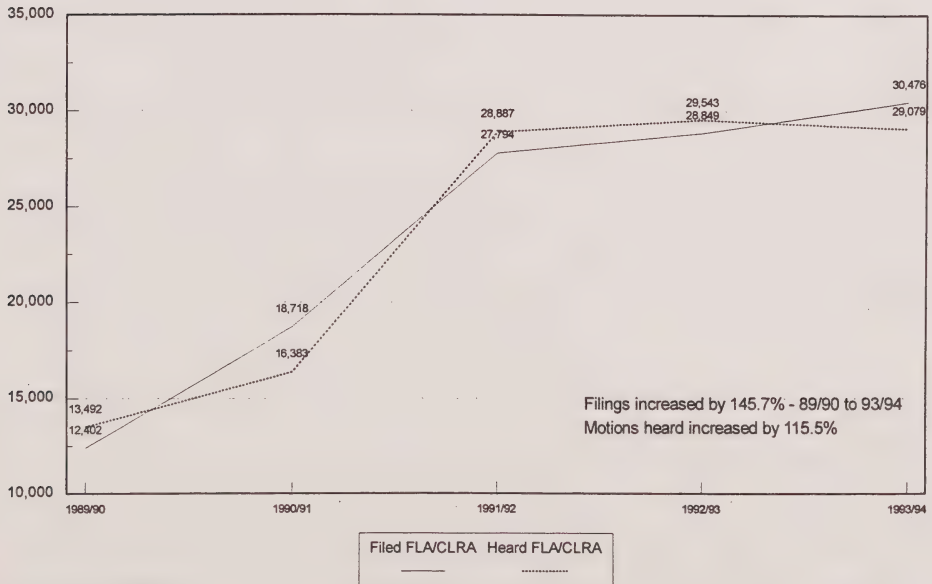
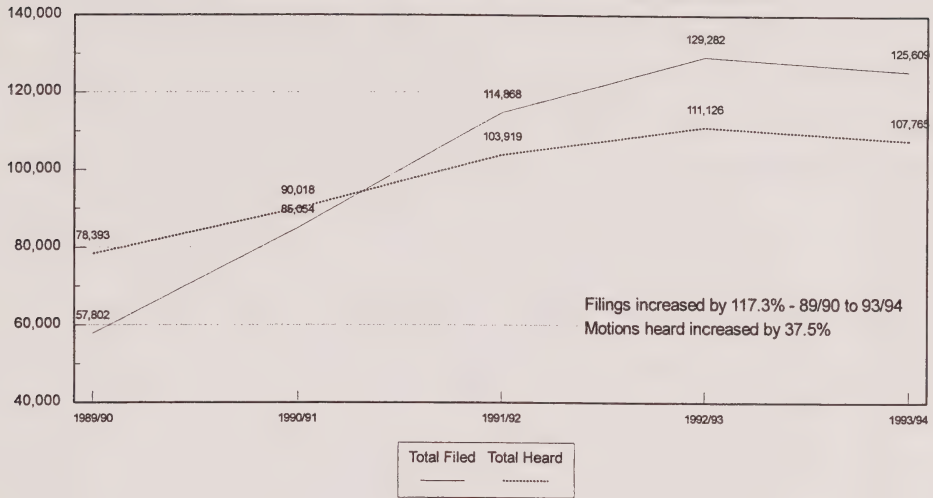
### Motions

Motions demand an increasing amount of the Court's time and energy. We have noted above that the amount of *time* devoted to dealing with motions in courtrooms has risen by 69% over the past 5 years. In that same period of time *the number* of motions filed in general matters has increased by approximately 100% and in family matters by approximately 150%.<sup>10</sup> In family law matters, the number of motions heard has managed to keep pace, approximately, with the number of motions filed, but overall the number of motions heard by the Court has fallen significantly behind the number filed. Charts 9 (a) and 9 (b) demonstrate those trends.

<sup>10</sup>Court Statistics Annual Report, *supra*, Provincial Summary.

Chart 9(a) &amp; (b)

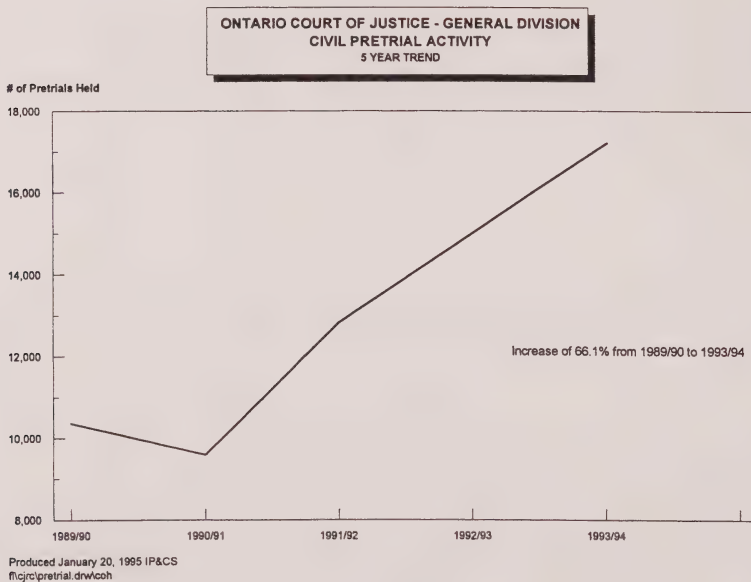
**ONTARIO COURT OF JUSTICE - GENERAL DIVISION**  
**MOTIONS ACTIVITY**  
 PROVINCE OF ONTARIO



## Pre-Trials

Pre-trial activity has risen significantly since 1989/90 as well -- by 66.1%. Ministry data does not yet separate civil pre-trials from criminal pre-trials, nor, as previously pointed out, does it capture the many pre-trials that are held in judges chambers rather in courtrooms. We have no way of determining the breakdown between civil and criminal pre-trials, but Chart 10 points out the marked increase on the demands of judicial time, and on staff, with respect to pre-trial activity.

Chart 10



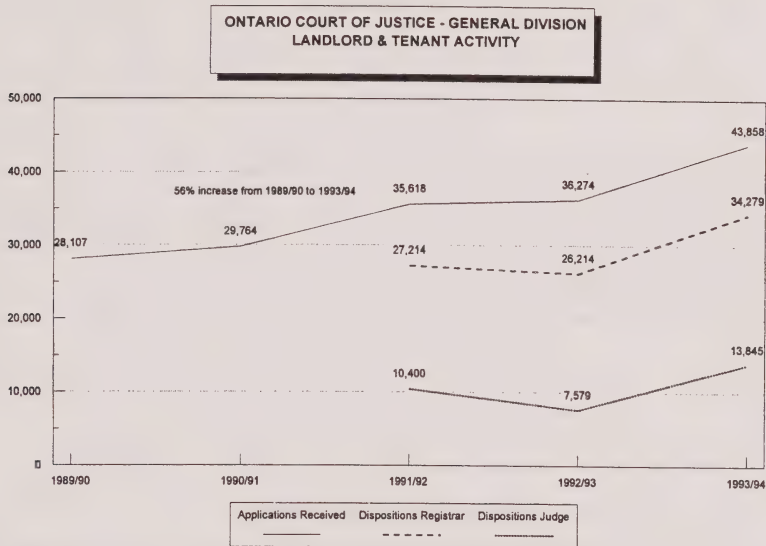
## Landlord and Tenant Activity

Landlord and tenant applications have steadily increased across the Province over the past 5 years. They have gone from 28,107 matters initiated in 1989/90 to 43,858 matters

initiated in 1993/94. Approximately 3/4 of these applications are dealt with by registrars. The remaining 1/4 must be heard by General Division judges.

Chart 11 sets this out.

Chart 11



Produced January 20, 1995 IP&CS  
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## INITIATIVES IN CRIMINAL MATTERS

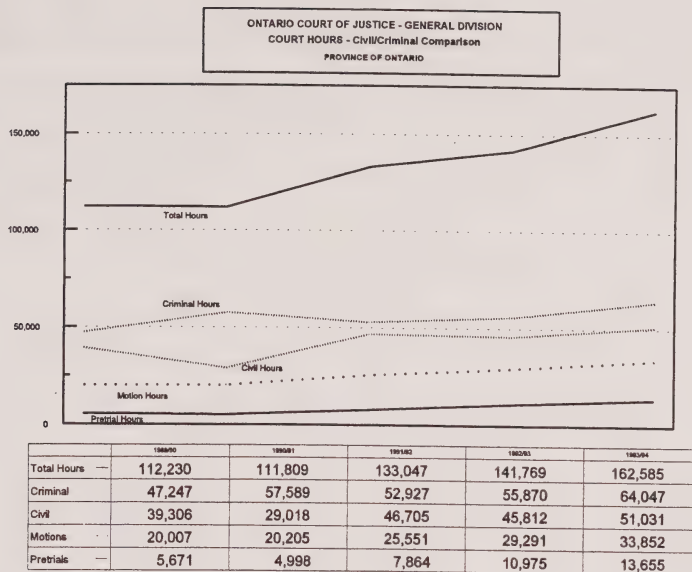
It was suggested to the Civil Justice Review on a number of occasions that one of the reasons for the delay in civil cases was that more and more of the Court's time and resources were being diverted from civil matters to criminal matters as a result of the impact of the Supreme Court of Canada's well-known decision in *R. v. Askov*.<sup>11</sup> That decision required resources to be devoted to criminal matters in order to ensure that criminal matters are disposed of within certain time parameters. At several public hearings, members of the public wondered why criminals are entitled to speedy justice -- and what they saw as "first class" justice -- whereas they, as honest, hardworking and taxpaying citizens, couldn't get their civil disputes disposed of except after long delays and huge expense. Judges in certain of the Regions -- particularly in the Central East and Central West Regions -- pointed out that the majority of their time was being absorbed by the criminal system.

Indeed, in Central West and Central East Regions it appears that the breakdown of the allocation of judicial resources between criminal and civil matters is approximately 70/30 respectively, although the caseload may not break down in that fashion. In other parts of the Province, however, the breakdown is different. In Toronto, it is approximately the reverse, although Toronto deals with a large criminal case load. On average across the Province, as the accompanying Chart 12 demonstrates, it would appear that, although criminal matters do absorb more of the Court's time than civil matters, the difference is not as marked as might be expected.

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<sup>11</sup>(1990) 59 C.C.C. (3d) 449. (S.C.C.)

Chart 12



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In 1994, the Ministry of the Attorney General launched its Criminal Investment Strategy. In the wake of *Askov* this strategy is intended to put into place a more effective method of dealing with the criminal cases in the system. The initiative, coupled with implementation of the recommendations of *the Martin Report*<sup>12</sup> seeks to improve pre-trial disclosure, to introduce pre-charge and pre-trial screening of cases and, in appropriate situations, to promote the diversion of less serious offences from the courts and the early resolution of those cases that are capable of resolution.

Early indications are that the strategy may be having the desired affect to this point, at least in the Provincial Division. The affect may then find its way to the General Division, thus contributing to the "breathing space" opportunity to which we have previously alluded.

<sup>12</sup>Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions The Hon. G.A. Martin 1993 (Hereinafter 'Martin Report')

Although the actual rate of Criminal Code offences being tried in the Provincial Division has remained relatively steady at slightly better than 10.5% between January 1, 1993 and December 31, 1994, the total number of Criminal Code trials is down because the total number of charges received has declined. Furthermore, the percentage of such cases being disposed of before trial has risen significantly from 59.1% to 69.5% (the goal is 72%).

Charts 13 and 14 pertaining to the Provincial Division are illustrative.

Chart 13

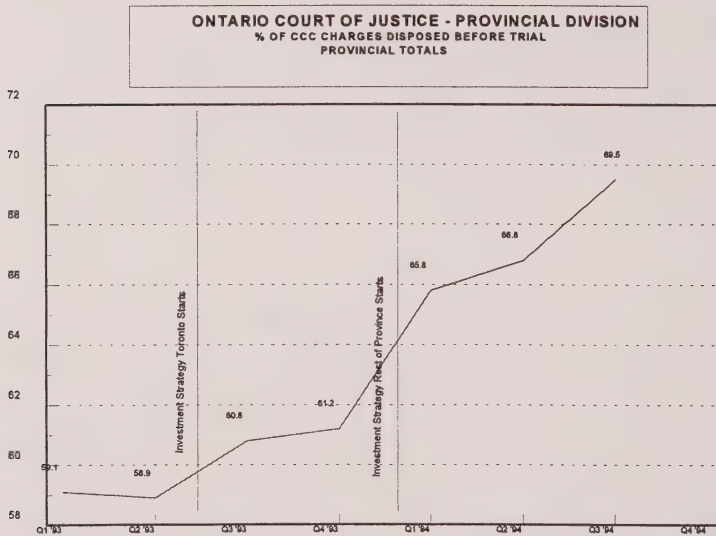
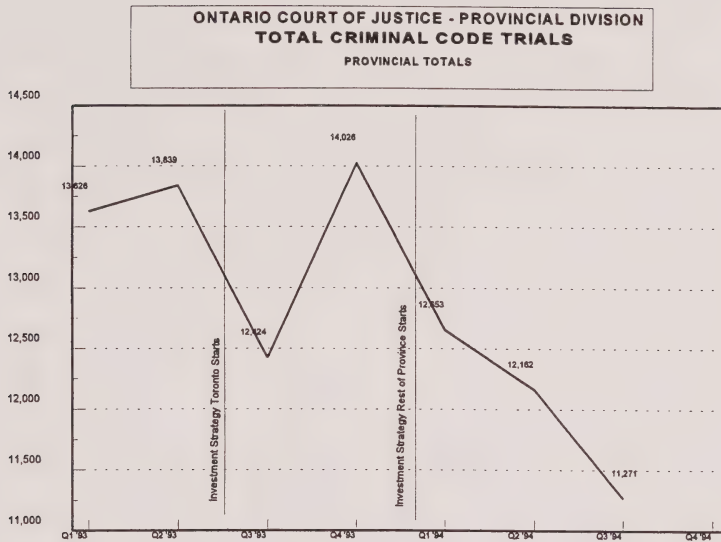


Chart 14

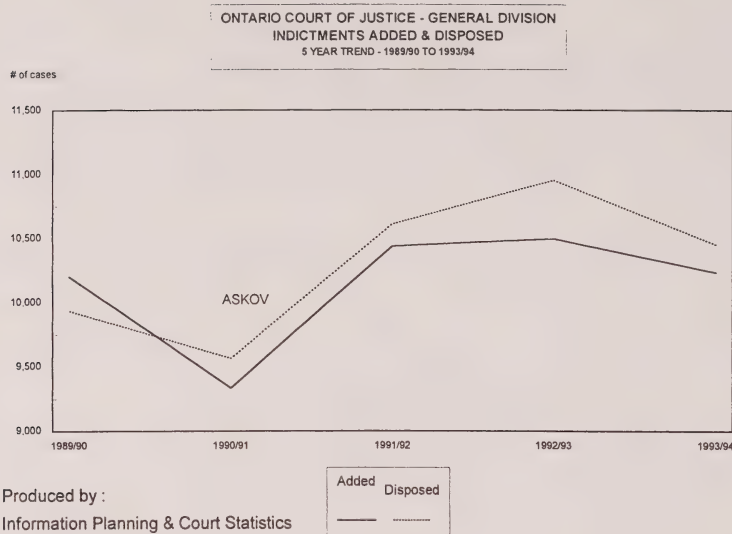


The direct impact of these initiatives on the General Division is not yet clear. The number of indictments entering the General Division is down somewhat since 1991/92, but not significantly overall since 1989/90<sup>13</sup>. There was a sharp drop in the number of indictments added to the General Division's load in 1990/91, followed by a slightly sharper increase in 1991/92, followed by a levelling off in number during 1992/93 and a slight drop in 1993/94.

Chart 15 demonstrates this pattern.

<sup>13</sup>An "indictment" is the document (or "charge") by which a proceeding enters the General Division process.

Chart 15



Some caution is necessary in assessing the impact of these numerical trends on the General Division, of course. As in civil cases, fewer numbers of cases coming into the system do not necessarily translate into fewer demands on trial resources - particularly if the cases coming in are the "hard" cases that require more trial time by their nature, and particularly in view of the increasing demands of time now being imposed by jury trials and *Charter* motions.

Nonetheless, while the full impact of the Criminal Investment Strategy on court pressures cannot be fully determined as yet, there are indications that it is having a positive impact.

A Federal Government initiative will also have an important affect on the number of criminal cases entering the General Division system. Bill C-42 will increase the number of

what are known as "hybrid" offences in the criminal system. "Hybrid" offences are those in which the Crown has the right to elect whether to proceed by way of indictment or by way of summary conviction proceedings.<sup>14</sup> It is expected that the amendments to the Criminal Code resulting from Bill C-42 will increase the number of instances in which the Crown will elect to proceed by way of summary conviction, thereby reducing the number of committals to the General Division. Again, it is too early to predict what impact this initiative will have on the courts, but it has the potential to make a significant difference in the number of cases coming into the General Division.

## CONCLUSIONS

Few firm conclusions can be drawn from the foregoing, it seems to us. As we point out later, in the Chapter dealing with technology and management information gathering, the data is not precise and, in some cases, is not reliable.

While the trend in the number of civil cases initiated in the General Division has been markedly downward in the past 2-3 years, it cannot be said with any degree of comfort that the decline will continue. The growing pressures of motions, pre-trial activity and landlord and tenant matters are substantial.

On the other hand, the number of civil cases being initiated in the system and added to the trial lists *are* down at the moment and courtroom hours utilized have risen dramatically. On a province-wide basis, the General Division is disposing of slightly more cases than are added to the trial lists on an annual basis, although there remain very serious -- and increasing -- backlog problems in centres like Windsor, Brampton, Toronto, Newmarket, Whitby and Ottawa.

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<sup>14</sup>Summary conviction matters are dealt with in the Provincial Division. If the Crown elects to proceed by way of indictment, there may first be a preliminary hearing in the Provincial Division to determine whether there is a case to go to a judge or jury. If the accused is then "committed for trial" the matter proceeds to the General Division for trial by judge and jury, or by judge alone.



The criminal investment strategy, generally, and the impact of Bill C-42 dealing with "hybrid" offences, may well have the effect of diminishing the number of criminal indictments coming into the General Division. Backlog strategies are being implemented in various centres through co-operative efforts of the Bar, the Judiciary and Courts Administration.

We believe, as we have stated, that the timely confluence of these events creates an opportunity for the Court to "catch up" and to implement new strategies and reforms. It is difficult, if not impossible, for recommendations for change to be thought through and implemented when everyone involved in the administration of justice must invest all of their efforts and attention to preventing the system from falling even further behind. The trends indicated by the data we have discussed suggest there may indeed be a window of change at hand which will provide some time for reflection and some opportunity for the reallocation of resources and energy toward the implementation of a plan for action and change.

We offer that plan in the remainder of our First Report.

## **CHAPTER 5**

### **THE PROCESS OF THE CIVIL JUSTICE REVIEW**

#### **5.1 Consultation**

As an integral part of our deliberations, the members of the Civil Justice Review wanted to create as many opportunities as possible to hear from those who are involved in, and who have an interest in, the civil justice system. We set out to talk to, and meet with, as many members of the public, judges, lawyers and court administrators as we could.

To accomplish this goal we arranged for public hearings to be held in 12 different cities across the province. During those community visits we met as well with representatives of the Judiciary, the Bar and Courts Administration -- on both a local and regional basis. We consulted with major Bar Associations as well.

Advertisements were placed in local newspapers. Twenty thousand pamphlets were distributed to the public. Over 600 letters were sent to community organizations and special interest groups. Almost 300 members of the public completed surveys designed by the Review and distributed through the public hearings, the Review Office, and courthouses throughout the provinces.

Approximately 340 people attended the public hearings. 95 written submissions were received from individuals and groups. In addition, 80 responses were recorded on the toll-free telephone number.

Approximately 156 employees of the Courts Administration Division of the Ministry of the Attorney General met with the Task Force and 27 written submissions were filed on their behalf.

All members of the Judiciary were invited to meet with the Review. One hundred and sixty-five Judges participated in regional or local meetings and approximately 30 judges filed written submissions of one sort or another.

All of the Provincial Bar Associations were invited to meet with the Review. 85 lawyers participated in regional or local meetings and each of the associations met with the Review. 48 written submissions were filed, including 7 from legal clinics. Over 500 surveys were completed and returned by civil lawyers.

In addition, the Review met with or received material from representatives of most of the various pilot project and other initiatives that are currently underway in the province. Some of these are listed in our Terms of Reference -- the case management pilots, the ADR Centre, the Advocates' Society Civil Litigation Task Force, the "venue" Committee, the Simplified Civil Rules Subcommittee, the Metro Court Study, and persons dealing with technology change in the province. These projects and initiatives are referred to in specific portions of this First Report.

## **5.2 Focus on Family Law**

It was anticipated, correctly, that much of the response to the Review would focus on Family Law. The Review established a special group of representatives from the bar, bench, public, courts administration, and native child and family services, to review the comments and suggestions raised in the consultation process and to make recommendation to the Task Force. This group is referred to, from time to time, in this First Report as "the Family Law Group".

## **5.3 The Cost of Civil Justice**

To deal with the special concerns about the cost of the civil justice system, both from the perspective of the taxpayer and the litigant, the Review gathered information by means of its own examination of government documentation on budgets and spending, by means of its own research, and through the distribution of

a specially designed survey to all lawyers in the province, practicing in the civil law area. In these efforts, we were greatly assisted by the voluntary contribution of Mr. Gerald Sadvari, partner with the law firm of McCarthy, Tetrault.

#### **5.4 Technology**

The need for major initiatives in the area of technology became readily apparent to the members of the Review, shortly into the process of our deliberations. We compared the situation in Ontario with the technology infrastructure currently in place in businesses, law firms and court facilities in various jurisdictions in the United States. While certain initial steps have been taken in Ontario to introduce some aspects of technology, there is no co-ordinated and uniform program across the province.

A separate research project was undertaken for the Review in connection with the issues relating to technology. In addition, information was obtained from various sources in the United States, including the Fourth Conference on Court Technology (CTC4) sponsored by the National Centre for State Courts.

#### **5.5 Research**

During and following the consultation stage, extensive research was conducted on all matters relevant to the legal issues and principles of the Review. Essentially, the mistakes and the successes of other jurisdictions were seen to be helpful to the Ontario experience.

Material was gathered from recent initiatives at the provincial and federal levels, as well as those conducted in England, Australia, and the United States.

**The Geneva Park Conference**

An important feature of the Civil Justice Review process was a Conference on "the Modern Civil Justice System" which was held at Geneva Park in October 1994. This Conference was not only a part of the process of the Review but evolved as well as part of the response to the Review. It was attended by senior representatives of the Judiciary, the Ministry and the Bar and by members of the Public. We will return to a description of this Conference after we deal in more detail with the responses received by the Review.

## CHAPTER 6

### RESPONSE TO THE REVIEW

#### 6.1 Generally

The overwhelmingly uniform response to the Consultation Stage of the Review was the urge for changes to the civil court system.

Many of the identified problems in the current system were shared concerns by the public, the court staff, the judges, and the lawyers. All spoke out against the delays, costliness, and complexity of the process; and most agreed that a renewed focus on the resolution of disputes was essential. Alternate dispute resolution options were consistently suggested as a necessary part of the process.

Those who had experienced case management -- and many of those who had not -- welcomed it as a positive step, particularly if the progress of the case was judicially controlled and properly supported by adequate resources. Adequate resources, we were told, included the efficient and consistent use of technology applications that would reduce the amount of paper in the system and minimize the need for more court staff time.

The collaborative approach of the Civil Justice Review was very favourably received. Many people quickly realized that this approach was unique and hoped that it indicated an end to the problematic relationship among the public, bench, bar, and court staff. This relationship, it was readily acknowledged, was best characterized by suspicion and a lack of communication. These difficulties were inherent stumbling blocks to the effective operation of the Regional Courts Management Advisory Committees and the Ontario Courts Management Advisory Committee.

It seemed apparent to all -- and was made readily apparent to us -- that the meaningful involvement of the public and more constructive roles for the court staff,



bench, and bar were essential to any proposed solutions.

## **6.2 The Concerns of the Public**

### **In General:**

In general, the members of the public were frustrated and sometimes angry with the court system. Their growing disrespect was apparent. They wanted more information in clear, plain language about the process; and they wanted a more simplified process, itself, with less cost and fewer delays. They wanted to see the mystifying complexity of the courts eliminated and they wanted to participate in a meaningful way in the decision-making processes that would accomplish these goals.

### **The Process:**

From the public's perspective the system is too complex and is seemingly designed to increase their cost, to limit their access, and to confound their expectations. Before they begin a court case they have a certain set of expectations which are rarely fulfilled. When the process becomes inevitably confusing, there is little if any information to explain what is happening. Many are frustrated in their attempts to meet with a judge and wonder why they cannot be part of the closed door discussions among the lawyers and the judges during the settlement phases of the lawsuit. They do not want to wait until trial to see a judge.

Many members of the public commented on the scheduling of motions and trials. The cost, inconvenience, and general disorganization of running lists for trials and fifty or more motions set for the same date and time is, in their view, mysteriously inept at best and grossly mismanaged at worst. They feel that they must wait inordinate lengths of time for everything, even decisions from their trial judge. It should be noted that the Bar expressed similar frustrations in this respect.

Those public members who had been involved in appeals to the Court of Appeal or the Divisional Court expressed concern about the lengthy delays in having

their matters heard and the mystifying complexities of the process, and about the cost involved.

Some were very complimentary about the service they received from court staff. Others had the distinct impression that the court staff were too busy to help or did not see it as part of their job to do so.

The Small Claims Court information booklets and packages were praised as helpful and clear. In the event of an appeal from a Small Claims Court decision, however, the praise turned to frustration. There is no information package available, and the process is complex and confusing.

There is a great deal of confusion about the enforcement provisions. The public is not aware of how limited the resources available for enforcement are.

### **The System:**

The most common concern expressed by the public was the inability to identify anyone in charge of the system. From both a litigant's and a taxpayer's perspective, this was troubling. Combined with this perceived lack of accountability were issues of uncertainty about the process and about the outcome of their particular cases.

Litigants in the civil court system believed they were at a disadvantage compared to those dealt with in the criminal system. They believed that their cases were given last priority, thus exacerbating the delays and the high costs.

Many suggestions about training in alternate dispute resolution techniques for professionals working in the system were made. The public want their cases resolved rather than just being the subject of elaborate technical manoeuvres. For the most part, they do not care whether their cases are resolved in a courtroom or elsewhere; they simply want them resolved. They view lawyers and judges as too accepting of

delays. To this end, litigants indicated a willingness to travel to other court locations if their case could be heard sooner.

Members of the public perceived a lack of respect and compassion on the part of some judges and lawyers, who appeared too willing, in their eyes, to rely upon technicalities at the expense of litigants.

### **6.3 Concerns of the Judges**

#### **In General:**

Most predominant amongst the concerns of judges was their frustration at not being able to meet the demands placed upon them so that they can serve the public in a timely and effective way.

#### **The Process:**

The judiciary emphasized the tremendous impact which the growing complexity of the law, and the growing complexity of trials, have had on the time needed for careful consideration of the issues placed before them. Constant legislative changes and new interpretations of the law by higher courts, particularly in light of "the *Charter* age", demand an increasing vigilance in the courtroom.

The backlog of trials in the large urban centres was cited as a constant and demoralizing source of frustration. Several Herculean initiatives, where individual judges have donated their judgment and vacation weeks to hearing trials, have not been able to stem the tide. A concrete, implementable plan is urgently needed for this issue.

Case management was viewed by judges, for the most part, as a helpful tool for controlling the process of individual cases, but was seen as very time consuming.

Currently there are several, often conflicting, goals for pre-trials. These need

to be clarified and separated so that settlement issues can be focused upon separately from trial management.

Generally, judges were very supportive of the role of the public in civil jury trials. They indicated that this was one of the few opportunities for the public to participate in the justice system.

### **The System:**

In attempting to rationalize the limited number of judicial resources, lawyers, court staff, and judges pointed out to the Review the tremendous debilitating impact of the loss of Masters to the system.

Prior to the merger of the District and Supreme Courts in Ontario, Masters had fulfilled an important quasi-judicial role in the processing of cases in the civil justice system. In general terms, they heard and decided issues involving intermediate steps in the processing of a case, before the trial. At the time of merger, in 1990, the Ontario Government decided to phase out the position of Master.

Several, broadly consultative committees have examined this issue and uniformly recommended the urgent need for the revival of this position.<sup>6</sup>

The judges indicated that their role should be limited to the areas in which they are really needed, namely in the trial of cases and in assisting the parties, where possible, to settle. The loss of a subordinate judicial officer has greatly hampered the ability of the judiciary to manage their caseload in a way that is fiscally and efficiently

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<sup>6</sup>Joint Committee on Court Reform, June 1991 Report to the Attorney Generals of Ontario and Canada; Joint Committee on Court Reform, Sub-Committee Report to the Civil Justice Review, November, 1994. Ministry of the Attorney General Survey, October 1992  
Canadian Bar Association - Ontario, Survey, 1994, report to the Attorney General of Ontario

effective. Moreover, the decision to phase out Masters without regard for the experience of those working within the system, had a demoralizing affect.

As well, judges commented on their general exclusion from the decision-making processes within the Courts Administration Division. Participation and improved communication would greatly assist in the smoother operation of the courts.

Judges also drew our attention to the current poor morale that they observe among the court staff due to constant changes and constraints in their areas of endeavour.

Judges demonstrated a strong commitment to the concept of a generalist superior trial court of general jurisdiction. They are willing to travel great distances from their homes and families in a meaningful circuiting pattern in order to accomplish this.

Some concern was expressed about the level of security in courthouses. The responsibility for policing security was transferred in 1991 to local police forces. This has produced an uneven level of security throughout the province.

## **6.4 Concerns of the Courts Administration Staff**

### **In General:**

Representations to the Review from staff involved in the administration of the courts, generally, depicted a sense of frustration at the repetitive, paper-intensive nature of their work and the sense that their input and suggestions were either not sought or ignored.

Most agreed that they needed the assistance of technology. They emphasized, however, the need to be provided with adequate time for proper training and a



transition period.

**The Process:**

Court staff spoke in particular about numerous inconsistent and cumbersome procedures. They pointed out that a great deal of time is often consumed by the need to check documents for lawyers when it is the lawyers who are supposed to be responsible for complying with the Rules of Civil Procedure. We were told of a number of occasions where lawyers apparently send their clerks to the court offices for the express purpose of "learning how things should be done".

Many files that are opened with the court are never defended and staff expressed concern about the relative high cost of processing and storing paper that will never be looked at again.

Quite naturally, staff believe that the cost of some of these inefficiencies should be reallocated to resources that would make the system operate in a more timely and effective manner.

They are concerned about the treatment that prospective jurors receive in the system. For very nominal payment, jurors wait for long periods of time in cramped facilities only to be told at the last minute that the trial has settled.

**The System:**

Court staff feel excluded from the communication and general relationship between the bar and the bench. Often their loyalties are pulled from one side to the other, but seldom are they invited to participate in joint discussions and decision-making. They report a different and more open relationship with the Provincial Division judges than with the judges of the General Division Bench.

Several suggestions for the increased role of administrative decision-making



in certain kinds of cases were made by the staff. They believe that such changes would make judges more available for the work that only judges can do.

## **6.5 Concerns of Lawyers**

### **In General:**

The first concern of lawyers in most large urban parts of the province was the delay in having their clients' trials heard. They were embarrassed and felt unable to explain to their clients the rationale behind growing backlogs of trials waiting to be heard, running trial lists where their case could be called on for trial on less than a day's notice, blitzes of trials where they had to cancel other client's cases, and lengthy motion lists which inevitably led to more adjournments and wasted time. The costs of these inefficiencies to their clients, and to themselves, were unjustifiable in the lawyers' views.

In general, lawyers supported a system of case management where judges take control of the timing of cases out of the hands of lawyers and clients.

### **The Process:**

Inconsistent practices and practice directions from local courts were uniformly discouraging to the bar. Lawyers who work in more than one courthouse or in neighbouring communities indicated that these problems were time consuming for them and costly for clients.

Most lawyers have brought some forms of technology into their offices and cannot understand why the court system continues to be so paper-oriented, with duplicate and triplicate copies of documents being required, and cumbersome procedures which demand three or four steps instead of one.

The complexities of the current legal environment increase lawyers' anxieties about negligence claims. They point to their professional duty to take all available

steps to secure and protect their client's rights, even where that involves delaying a matter when it is to their client's benefit to do so.

There was consistent support for pre-trials which are well done, that is to say, where the parties are prepared, where sufficient time is made in the judge's schedule, and where the purpose of the pre-trial meeting is clear. Lawyers suggested that there needs to be separate meetings for settlement discussion and trial preparation. Early opportunity to meet with judges with their clients was urged by the bar. In addition to the above suggestions about settlement meetings and case management generally, lawyers were concerned that the current number of judges would simply not allow for these important opportunities.

Lawyers were not all supportive of juries for civil cases. They indicated that a jury was often simply used as a tactical strategy depending on the nature of the client and the particulars of the claim.

The current system of circuiting for judges was a concern. Valuable judge time is often lost when lengthier trials cannot be started near the end of a visiting judge's time.

Where parties and their counsel have abused the process, lawyers felt that the cost sanctions available in the Rules were not being adequately utilized. The Bar urged that these abusive practices need to be stopped and suggested that if the current rules do not have sufficient teeth, they should be amended.

### **The System:**

System-wide issues for lawyers included inadequate facilities in courts, lack of security, and lack of technology.

Many lawyers, in their representations to the Review, expressed concern about

the limited number of judicial resources and how they could be allocated to cover the demands of case management, pre-trials, trials, and the backlog. As indicated in the section above regarding the judicial concerns, lawyers were dismayed by the decision of the government to phase out the Master position. They believe that this has contributed to the current inefficiencies in the processing of cases and the resulting increasing costs to their clients. In addition to the reports referred to previously, it was pointed out that in many other jurisdictions, both in Canada and the United States, a subordinate class of judicial officer has been necessary to deal with the high volume of civil issues which do not require the attention of a judge.

Finally, lawyers also noted the poor morale among court staff due to the constantly changing procedures and fiscal constraint measures.

## **CHAPTER 7**

### **GENEVA PARK: THE MODERN CIVIL JUSTICE SYSTEM SEMINAR**

On October 24th and 25th, 1994, the Civil Justice Review sponsored a workshop entitled: "The Modern Civil Justice System: Weaving the Elements Into the Whole". It was held at the Geneva Park conference Centre north of Toronto, and has become known in Civil Justice Review circles as "The Geneva Conference".

The Geneva Conference was an important event in the deliberations and process of the Review, and thus merits some separate mention. For the first time in the history of the Province, senior representatives of the "three solitudes" -- the Bench, the Bar and Courts Administration -- and members of the Public met together for a concentrated period of time to share perspectives on the civil justice system. There were 82 participants. They learned that they could indeed meet and plan and talk about their visions of the system, in a constructive way.

Topics discussed over the period of two days included:

- perspectives of a successful court system;
- caseload management;
- perspectives on costs;
- the role of technology;
- the experience of case management in the U.S.
- the division of roles in managing the system;

Included in the 82 participants at the Conference were administrators, academics and judges from the United States, who brought the experience and knowledge already gained by them in many of these aspects of reform to contribute as group leaders, panelists and speakers.

Working groups of participants focused on such themes as management standards, scheduling, dealing with backlog, circuiting, public resource management,

case decision-making and ADR, public accountability, and policy formulation and approval.

The Geneva Conference provided a unique opportunity for the participants in the system to share their differing perspectives, to educate each other, to develop areas of consensus for change and, finally, to establish and build the necessary ongoing working relationships which are key to the success of any meaningful changes. The workshop was an important step in the formulation and refinement of the review's ultimate recommendations and demonstrated that there exists a committed will amongst all of the participants to make changes.

**PART II:**

**MAKING THE CIVIL JUSTICE SYSTEM WORK EFFECTIVELY**





## CHAPTER 8

### INTRODUCTION: WHERE CHANGE IS NECESSARY

Pooh was puzzled. Actually, he wasn't so much puzzled as he was *confuzzled*. Confuzzled was almost the longest word that Pooh knew, and he hadn't known that until Christopher Robin had explained that it meant *sort of mixed up and baffled*. (italics added)<sup>7</sup>

So it is with the justice system. Confuzzlement, it seems, reigns.

Roles are confused. Lack of consultation and co-operation between the participants in the justice system leads to an administrative monster that muddles along at best. What's worse, it is a two-headed monster, with government responsible for most matters of administration and management, but with the judiciary responsible for the important areas of scheduling, assignment of judges and trial co-ordination. Resources and funding are constantly dwindling. The system is in crisis.

The public is puzzled and upset about all of this. The most frequently asked question in our consultations with the public, as we underscore several times throughout this Report, was,

"Who's in charge here ?"

There are five major ways, we believe, in which change must be addressed in order to make the civil justice system work effectively and in a manner that is consistent with the benchmarks which we outlined at the beginning of this Report.

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<sup>7</sup>R.E. Allen, Winnie-the-Pooh on Management: In Which a Very Important Bear and His Friends are Introduced to a Very Important Subject, E.P. Dutton & Co., Inc. New York, New York, 1994, at p. 21.

Those benchmarks, to repeat, are the following:

- Fairness
- Affordability
- Accessibility
- Timeliness
- Accountability
- Efficiency and Cost-Effectiveness, and
- A Streamlined Process and Administration

The five major areas in which change must be effected are these:

### **1. Changing Attitudes and Roles**

There must be important changes in attitude on the part of the "three solitudes" most intricately involved in the system -- the Bench, the Bar and the Ministry -- including a recognition that meaningful public participation is necessary. Moreover, there must develop a will amongst these former solitudes to create a spirit of collaboration and co-operation and of shared responsibility and accountability in the operation of that system. Historical roles are changing.

### **2. A Unified Administrative and Budgetary Structure**

A unified structure for the administration and management of the Courts with clear lines of responsibility and accountability must be established.

### **3. Caseflow Management**

An overall system of caseflow management must be phased in across the province. This, too, has significant ramifications for the way in which the civil justice system is structured and supported, and for the traditional roles of lawyers and judges.

#### **4. Technology**

Technology must be put in place,

- a) to provide an accurate and reliable data information base for analysis and management of the system;
- b) to enable the automated filing, recording, storing and transferring of documents and the automated payment for such transactions;
- c) to equip the judiciary with necessary computer and electronic facilities to assist them in the courtroom, in the making of their decisions, and in the management of their caseload; and,
- d) to facilitate easier access for the public through interactive and simple technology such as kiosks or user-friendly terminals at court offices.

#### **5. Funding**

The system must be properly and adequately funded, a dictate which requires not only wholesale changes in the way in which overall resources already available to the justice system are allocated and utilized, but also a total re-assessment of the way in which future resources are allocated to the justice system.

#### **6. Cost**

The cost of justice, and the various ways in which such cost is incurred, must be re-examined.

This section of the Report, Part II, deals with the foregoing changes.

## **CHAPTER 9**

### **CHANGING ATTITUDES, ROLES AND RESPONSIBILITIES**

Four groups, principally, are involved in the justice system. They are:

1. the Judiciary;
2. Government;
3. Lawyers; and,
4. the Public.

The public comes to the justice system in a number of capacities. The members of the public are taxpayers. They are voluntary or involuntary users and clients. They are electors of the political representatives who have ultimate responsibility for the shape and funding of the system.

In spite of these various capacities, members of the public play very little direct role in the design and administration of the system, which exists for their benefit. Their mood, however, is no longer one of acceptance of this state of affairs.

The public is insisting upon a changed and greater participatory role. Such a changing role, we believe, will carry with it the appreciation and knowledge that more public support -- communicated to legislators in a fashion that spurs them to action -- is necessary to ensure that the justice system receives the recognition in terms of resources that its priority requires.

The Judiciary, the Bar and Government (through the Administration) are the "professionals" in the system. Classically, it has been the function of the Judiciary to adjudicate the public's disputes, the function of the Bar to advise and to represent the public in that adjudicative process, and the function of Government -- in this role

-- to provide the infrastructure necessary for the administration of justice. These classic roles continue to hold true today. Two observations may be made about this:

(i) Firstly, this division of responsibility, while generally serving the public well, has led to a divided approach in the administration of justice which, in today's complex society, is placing significant strain on the smooth operation of the system; and,

(ii) Secondly, the clear lines of demarcation between these roles is becoming blurred as judges become more involved in the administration and processing of cases.

In each of these constituent groups -- Administration, Bar and Judiciary -- there are individuals who are working hard to build bridges and to devise co-operative methods of addressing and finding solutions to the problems which have beset the system. In general, however, the Judiciary, the Administration and the Bar have maintained an individuality in their approach to the system which has precluded a sense of collaboration, co-ownership or co-responsibility for these problems. There is a tendency to view the system from the perspective of one's own constituency and to view the failings of the system in terms of the needs of that constituency. Along with this tendency goes a reluctance to admit to being a part of the problems.

Seldom, for instance, did we hear from any representatives of the various groups that their group was responsible for any of the problems or that it might be doing something better, although there were some, to be sure, who did recognize that such was the case. Usually, though, the problems were laid at the feet of the other group.

This attitude has led some to describe the Courts Administration, the Judges and the Bar as "the three solitudes". Indeed, there are times, in our estimation, when



those responsible for the workings of the justice system might benefit from looking into the mirror and remembering the old adage,

"We have seen the enemy, and they is us."

Re-configuring the justice system so that it will meet the benchmark tests set out earlier will require changes in attitude, in roles and responsibilities, and in the assumption of leadership, on the part of each of these constituent groups. It will require changes in the level of public participation in the system. It will require changes in the degree of communication between those involved. Finally, it will require changes in the structure of accountability within the system.

While we recognize that some of the changes discussed cut across the boundaries of civil justice, we reiterate that our mandate is "to develop a strategy for the civil justice system as a whole". Implementation of the changes we are proposing are necessary for the development of such a strategy.

## **The Public**

Historically, the public has not had a direct role in the justice system, except through their parliamentary representatives. As a result, too little attention has been paid, in a systemic way, to the needs, wishes, and reasonable expectations of the public. While the justice system exists for and is paid for by the public, the public's voice often goes unheard in matters relating to the administration or design of that system.

Members of the public approach the justice system as taxpayers, as electors, as users or clients, as jurors, and in various volunteer capacities. In all of these capacities, we believe, the public recognizes that justice is central to the foundations of society and is necessary for a peaceful, stable, and caring society. Our consultations revealed, however -- as, indeed, does any cursory glance through the

eyes of the media -- that the public is close to losing faith in the justice system and in the other three groups which are integrally involved in its management.

We must make changes to reverse this trend.

Citizens are less willing today to place blind faith and trust in institutions, in professionals and in elected officials. They are more demanding of accountability, more insistent on openness, and more determined to be involved in actively shaping what happens in their public institutions.

There is criticism about a perceived callousness on the part of the courts and on the part of those who work within the system, and also a perceived insensitivity to the needs of the very public whom the courts are there to serve. Although people recognize the volume and complexity of the issues before the courts, there is a pervasive belief that the system plays havoc with people's lives and financial resources, often putting the needs of the system and the professionals and staff within it before the needs of the public. There is an enormous sense of frustration and anger about this, and this spreading feeling of discontent was made apparent to the Review during its consultation stage, discussed in Chapter 6 of this Report.

In our opinion a greater participatory role by members of the public in the justice system is both inevitable and appropriate in today's society. It is inevitable because, as noted above, the public is demanding it. It is appropriate because the justice system exists only for the purpose of serving the public, and the members of the public can best understand that they are being well served when they are participating in a worthwhile fashion in the system.



## **The Ontario Courts Management Committee and the Regional Courts Management Advisory Committees**

We do not believe that there presently exists in Ontario appropriate public input into the operation of the civil justice system.

Regional Courts Management Advisory Committees (RCMAC's) in each of the Province's 8 Regions, and the Ontario Courts Management Advisory Committee (OCMAC), were designed to remedy this shortcoming, but in our view have not yet done so. Nonetheless, they have the potential to be excellent vehicles for accomplishing such a task.

These bodies are created by statute, and are required to meet four times annually. Members of the public, court administrators, lawyers and judges, sit on them. Their function, as articulated in sections 73 and 75 of the *Courts of Justice Act*, is,

to consider and recommend to the relevant bodies or authorities policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest.

This mandate is advisory, but very broad. However, it is not being carried out effectively across the Province.

There are some examples of RCMAC's that are operating with meaningful public input, but they are the exceptions rather than the rule. We spoke with public members of RCMAC's in every Region. Without fail they all indicated that they had applied for the position eagerly anticipating a meaningful involvement in the justice system. They had been selected from many applicants -- a signal, in itself, of the widespread interest amongst the public in such participation. Typically in practice,

however, they felt isolated from actual decision-making; they were not sure they were being listened to by either the Regional Senior Justice or by the Court administrators; and they were not sure that they receive enough information or support to make even advisory recommendations. As one RCMAC member said to us:

"I don't know where the action is, but I know where it isn't, and that is here."

We believe this can, and must, be altered.

OCMAC -- the Ontario Courts Management Advisory Committee -- is composed of the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Ontario Court of Justice, the Chief Judge of the Ontario Court of Justice (Provincial Division), the Attorney General, the Deputy Attorney General, two Assistant Deputy Attorneys General, two other public servants, six lawyers and as many as six members of the public. It is hard to imagine a Committee better positioned to make recommendations to "the relevant bodies and authorities" about "the better administration of justice and the effective use of human and other resources in the public interest" than this Committee. In truth, many of the "relevant bodies and authorities" *are on* the Committee ! Yet there is not a sense that it is working productively, and it appears to have little, if any, ties with the Regional Committees.

The Regional Committees, themselves, are well-positioned to identify regional and local problems, and to contribute to their solutions. They are well-equipped also to feed into the identification and resolution of province-wide issues as well.

OCMAC and the RCMAC's are representative of the four constituent groups involved in the justice system -- the Public, Courts Administration, the Bench and the

Bar. The participatory process which they bring to the system is equally as important as the substance of their advice and recommendations.

Both are important.

The Civil Justice Review recognizes and supports the broad advisory role provided by the *Courts of Justice Act* to OCMAC and the RCMAC's.

#### **RECOMMENDATION:**

**We recommend that the Ontario Courts Management Advisory Committee and the eight Regional Management Advisory Committees develop a cohesive structure amongst them for purposes of co-ordinating and enhancing their advisory functions across the province.**

**We further recommend that these Committees be recognized and accepted by the Bench, the Ministry, the Bar and the Public as an important piece of the justice structure in Ontario, and that efforts be made to ensure that their mandate to consider and recommend policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest, be duly carried out.**

We understand that a joint meeting of OCMAC and the RCMAC's is presently being organized for Spring 1995. We commend this Spring conference as an opportunity for these Committees to consider their mandate and structure, and how they should relate to each other.

Bench and Bar Committees also exist in most Regions. They concern themselves with day-to-day problems in the Region involving the operation of the courts, and perform a valuable function in this regard. In some Regions and local



areas, representatives of Courts Administration also attend the Bench and Bar Committee. We recommend that this practice be extended to all Regions.

#### **RECOMMENDATION:**

**We recommend that the practice of including representatives of Courts Administration in regional Bench and Bar meetings be extended throughout the province.**

There are other areas in which the needs of the public must be reflected as well.

#### **A Unified System of Administrative, Management and Budgetary Accountability**

Elsewhere in this Report we recommend that steps be taken to implement a system of unified administrative, management and budgetary accountability, with clear lines of authority and responsibility. The public must be involved in an effective participatory way in any such structure.

#### **The Three Solitudes**

Underlying a veneer of co-operation amongst the Judiciary, Government and the Bar, there is a deep chasm of mistrust and defensiveness. This is particularly so between Government, on the one hand, and the other two constituencies, on the other. Government is seen as having fallen down in its obligation to provide for the administration of justice. The Bench and the Bar are seen as being unduly resistant to changes which will make the system run more efficiently.

Statutory and historical responsibility for the operation of the Courts is divided between Government and the Judiciary, a bifurcated approach to the administration of justice which leads to confusion, to indefinable lines of authority and responsibility

and accountability, and ultimately to ineffectiveness. What it leads to is "confuzzlement" -- to advert once more to the world of Winnie the Pooh.

The miracle of the civil justice system is that it works at all. That it does is attributable to the energies and efforts of judges, lawyers and administrators who every day do more than we have any reason to expect of them. Much of this work is done "after hours" and on a "volunteer" basis. Indeed, one person noted that the system is held together "by the bailing wire and chewing gum of volunteerism". The civil justice system cannot be placed on a sound footing if it must continue to rely on such "extra" efforts for its long term viability.

What is required is a significant change in the attitude of judges, court administrators and others who work within government, and members of the Bar who practice in the courts. These participants must take responsibility for ensuring that the civil justice system operates in a spirit of co-operation and co-proprietorship which does not now exist. From our public hearings and other submissions, we believe the public is only too aware of the chasm between the court administration bureaucracy and the judges -- witness, in this respect, the frequent repetition of the question: "Who's in charge here?". The Bar will from time to time side with one group or the other as its members believe their interests dictate. This has led to a diminution of public respect for the Court, and to a sense that the justice system is leaderless.

Leadership is important. The civil justice system is in crisis, in large part due to an absence of co-ordinated and co-operative leadership on the part of its participants.

*Many of the recommendations which we make in this Report are premised on the willingness of Government, Judiciary and the Bar to exhibit a new form of co-operation and co-management of the justice system and its problems. Such an attitude must*

*permeate throughout the system -- from Chief Justices and Attorneys General and those with leadership in the Court and Government, and from those in positions of leadership within the Bar, throughout the entire ranks of their colleagues. This leadership must demonstrate that a new order is afoot and that the operative philosophy of the day is co-operation and co-management. It must demonstrate that changing the way in which the constituent groups in the justice system have dealt with each other in the past is imperative for the creation of a renewed and effective civil justice system in the future.*

There are encouraging signs, in recent times, that this is happening. The Joint Committee on Court Reform ("JCCR") is a composite group of several legal associations which works with the Judiciary and with Courts Administration on matters relating to the reform of the courts and the justice system. Bench and Bar Committees remain active in many centres, and some are now beginning to incorporate Ministry representatives into their deliberations, as we have indicated. The case management pilot projects and the ADR Centre pilot project, to which we will refer later in this Report, are other examples of efforts that have engendered close collaboration and co-operation on the part of those who are involved in the system.

The common characteristic of these initiatives is the recognition of a shared responsibility for defining the problems and for creating solutions to those problems together. This is exactly the sort of co-operative approach to responsibility for the system which we believe is essential if we are to advance the potential for a successful civil justice system for Ontario.

The changes in attitudes and roles will be reflected, in varying degrees, in each of the constituent groups in the system.

Judges and lawyers will have to adapt to the modifications in their traditional approaches to the processing of litigation, with the Judiciary assuming the ultimate responsibility for the movement of cases through the process. Lawyers will have to become accustomed to adhering to stricter time parameters. Judges will have to be prepared to enforce those parameters.

Those working in Courts Administration will be required to adapt to new, more streamlined, procedures, and to become more technologically proficient. They will also require the training which will qualify them to perform their revised roles in the new system, which will call upon them to assume more responsible positions and to accept the accountability which accompanies such responsibility.

Government, in the broader sense, must accept that a new approach to assuring proper and adequate funding for the civil justice system is necessary. "Courts Administration" should not be buried amongst the other competing demands of a Ministry budget. It must stand alone, and be assessed on that basis.

The public will play a more participatory role in the civil justice system. With that greater participation will come a greater responsibility to hold their legislators responsible for providing proper and adequate funding for the system, and for providing, generally, "for the administration of justice in the Province".

People do make a difference. It is within the grasp of those who are in leadership roles in Government, the Judiciary, the Bar and the Public to make the system work better and more effectively. However, the collective and individual will to do so is of central importance.

Our consultations have persuaded us that this collective will currently exists.

## CHAPTER 10

### CREATING A RESPONSIBLE JUSTICE SYSTEM STRUCTURE: A UNIFIED ADMINISTRATION, MANAGEMENT AND BUDGETARY MODEL

"Court management is no sport for the short winded"

(Dean Roscoe Pound)

The study of court reform and the reform of court administration in Ontario and Canada has a long history. In recent years alone, we have seen the Ontario Law Reform Commission *Report on Administration of Ontario Courts, Part I* (1973); the Central West experiment which took place thereafter; the Ontario Government's White Paper on Court Reform in 1976; the Deschênes Report, *Maîtres Chez Eux/Masters in Their Own House* (1981); the *Report of the Ontario Courts Inquiry* (1987) (Zuber Report); the *Report of the Canadian Bar Association Task Force on Court Reform in Canada* (1991); and the Joint Committee on Court Reform *Report on Ontario Court Administration* (1992).<sup>8</sup>

In addition, there have been numerous academic writings on the subject, including those by Perry S. Millar and Carl Baar, *Judicial Administration in Canada* (1981);<sup>9</sup> and by Ian Greene, *The Politics of Judicial Administration - the Ontario Case* (1983).

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<sup>8</sup>Report on the Administration of Ontario Courts, Vols. 1-3, Ontario Law Reform Commission, 1973; White Paper on Courts Administration, Ministry of the Attorney General, 1976; Maîtres Chez Eux/Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts, The Hon. J. Deschenes, Canadian Judicial Council 1981; Zuber Report, *supra* note 2; Report of the Ontario Bar Association Task Force on Court Reform in Canada, Ottawa, 1991; Joint Committee on Court Reform Report on Ontario Court Administration, submission to the Attorney General of Ontario, June 1992.

See also, Chief Justice Frank W. Callaghan, *Remarks to the Advocates' Society*, published in the *Advocates Journal*, Vol 11, Number 1, 1992, at page 3.

<sup>9</sup>P.S. Millar & C. Baar, Judicial Administration in Canada (McGill-Queen's University Press: Montreal & Kingston, 1981) [hereinafter "Millar & Baar"]



We have reviewed these studies, as well as the experience of other countries and jurisdictions, including the United States of America, England and Australia.

Prior attempts in Ontario to make revisions in this area has failed. They have foundered on the rock of judicial independence, smashed against the reef of judicial and political differences, and become stuck in the shifting sands of administrative and political expediency.

In our view, however, the court system can no longer function effectively in Ontario unless and until a single authority, with clear lines of responsibility and accountability, is established to determine all administrative, financial and budgetary, and operational matters relating to court administration in the province. The ship of state must be redirected in this respect.

#### **A Review of the Need, with Reference to Previous Studies**

In *Judicial Administration in Canada*, Millar and Baar described courts administration in Canada generally, in the following terms (pp. 5-6):<sup>10</sup>

... a fractured mosaic of individual fiefdoms, which has grown historically in response to immediate needs, short-term planning, political and budgetary expediencies, federal, provincial, county and municipal political structures, and from the inexpressible mores of a legal subculture bequeathed over the centuries and unconsciously imprinted on modern attitudes. In short, the process known in Canada as court administration is a somewhat ramshackled and outmoded conglomerate of diverse systems, the legacy of an unsophisticated social era. It is unschooled in modern management methods, lacking in modern business technology and equipment, and unalerted to the task of administering a highly complex and self-contradicting organization. Courts now face the burden of effecting large-scale organizational reforms in a relatively short period of time in order to preserve the patterns of justice at the core of their being: the day-to-day operations in the courtroom itself.

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<sup>10</sup> Millar & Baar, *supra*, note 15 at pp. 5-6



Citing this passage, the Zuber Report noted that it was "apt to the situation in Ontario".<sup>11</sup> While merger and regionalization of the courts in 1990 have attempted to address the "fractured mosaic" concept -- with mixed reviews, it can be said -- very little has happened since the Zuber Report to change the foregoing description. Indeed, many would argue that the situation is worse.

This is not to say that efforts have not been made to improve the court system. There have been. Lack of an overall vision, as well as fiscal restraints and diminishing resources attributable to courts administration have contributed to the lack of success of these efforts, however.

In mid-1992 the Joint Committee on Court Reform, in its *Report on Ontario Court Administration*, identified a list of existing problems which, it said, "underline the need for a new management structure". They were (see pp. 5-12):<sup>12</sup>

- Inherent conflicts in administrative roles;
- Present management as crisis management;
- An inadequately funded administration;
- Administrative problems preventing the timely processing of cases, and creating delays and costs to the public; and,
- Defects in the present system causing its participants to be frustrated and not to work optimally together.

In varying degrees these problems continue to exist today. The single most important area which continues to frustrate an effective and co-operative system of

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<sup>11</sup>Zuber Report, *supra*, note 14, p. 140.

<sup>12</sup>Joint Committee on Court Reform on Ontario Court Administration 1992, *supra*, note 14, pp. 5-12.

administration, however, is that involving the tension and conflict between the administrative roles of judges and government. This, in turn, results in poor allocation of resources and ineffective management, and translates into situations, at the every-day operational level, where things simply do not work.

The judiciary is responsible for matters of administration bearing directly on the exercise of judicial functions. Primarily, this responsibility embraces control over the lists and the scheduling of cases and over the assignment of judges and courtrooms for the hearing of those cases. This responsibility is a necessary adjunct to the preservation of the institutional independence of the judiciary.

On the other hand, the statutory jurisdiction over staff, over budget and financing, over technology, over organization, and over physical facilities, rests for the most part with the Ministry of the Attorney General. At the same time, the Attorney General, and other government ministries and agencies, are major civil litigants in the courts. They are thus affected by, and intensely interested in, matters relating to court lists, scheduling and the assignment of judges. An administration structure which makes government responsible for virtually all aspects of the infrastructure necessary to enable the members of the judiciary to perform those functions gives rise to an obvious conflict.

We wish to be clear. We are not suggesting there are examples of interference by government in such judicial responsibilities. The matters referred to as reserved to the judiciary do provide a bulwark against such interference. When the administration and funding of the system are left in the hands of the Province's major litigant, however, the inherent friction that is created impedes the effective management of that system.

Former Chief Justice Frank Callaghan, of the Ontario Court of Justice, commented on this tension in a speech to the Advocates' Society in June 1991. He said:<sup>13</sup>

.... Nothing I say tonight should be taken as suggesting that judicial independence in decision making in court in this country is any less honoured today than it was in the past. No one has ever sought to apply pressure in a particular way to a superior court judge nor have I heard of any other judge coming under such pressure.

But I do see a different and more insidious threat to the independence of the judiciary as an institution, as opposed to the independence of each judge as an individual: a threat to the independence of the judicial system as opposed to the judges who operate it. The threat arises by reason of the control of finance and administration by the executive branch of government.

At first sight, many would not regard the control of finance and administration as providing any threat to judicial independence. But if the matter is given more consideration, it is to my mind apparent that the control of the finance and administration of the legal system is capable of preventing the performance of those very functions which the independence of the judiciary is intended to preserve, that is to say the right of the individual to a speedy and fair trial of his or her civil claim as well as a criminal allegation by an independent judge. To take a fanciful example for the purpose of illustration, the enforcement of the rule of law by the judges could be wholly frustrated by the refusal to provide courtrooms for judges to sit in or staff to service those courts. To take a much less fanciful example, there is in my view an interference with the enforcement of the rule of law if there is a failure to finance the provision of adequate court facilities and court staff to meet society's current demands for justice. The integrity of the legal system does not depend solely on the integrity of each individual judge. It also depends on the ability of the citizen to come before the independent judge and receive his or her judgment.

The importance of the judiciary having control over matters of judicial administration, in the context of judicial independence, was confirmed by the

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<sup>13</sup>Callaghan, *supra*, note 14, pp. 3-4.

Supreme Court of Canada in *Valente v. The Queen*, [1985] 2 S.C.R. 708. There, Mr. Justice LeDain, speaking on behalf of the Court, said:

The third essential condition of judicial independence ... is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. Howland C.J.O. drew a distinction, for purposes of the issue in the appeal, between adjudicative independence and administrative independence which is reflected in the following passages in his reasons for judgment at pp. 432-433:

‘... In Ontario the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the courtrooms and the court staff. The assignment of judges, the sittings of the court and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudication function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration ...’

Judicial control over the matters referred to by Howland C.J.O. -- assignment of judges, sittings of the court and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or ‘collective’ independence ... .

A unified court administration structure, with single line accountability and responsibility, raises difficult questions in this regard. By definition, these "judicial administration" functions must be incorporated into the system. How can this be done, while preserving at the same time the principles of an independent judiciary and of public and governmental accountability ?

The 1991 Canadian Bar Association Task Force Report, *Court Reform in Canada*, summarized the dichotomy in this fashion:

The question of where the responsibility for court management and administration should lie is an intricate one which raises questions about judicial independence, public accountability and jurisdictional cooperation. With respect to judicial independence, one view is that it is the judges' function to adjudicate, not administer. Involvement by judges in administration and management, it is argued, may undermine judges' independence because the administration and management functions will inevitably involve discussion with government about budgets and policies and may lead to the involvement of judges in such matters as staff relations and contract administration. Others take the opposite view. Judges, it is argued, must be masters in their own house to protect their capacity to administer justice independently, fairly and efficiently. Moreover, almost everyone agrees that judges must retain control over such matters as case assignment and the list and it would be sensible on both logical and pragmatic grounds to add to that necessary core of judicial control other administrative responsibility.

In concluding the section of its 1992 Report on Ontario Court Administration dealing with this subject, the Joint Committee on Court Reform stated:

"The present separation of control over the different elements essential to providing the service frustrates the application of traditional management concepts and, in the absence of a very high degree of communication and cooperation, leads to serious problems."

With this statement we agree. Even with the "very high degree of communication and cooperation" which the Joint Committee envisaged as necessary, and which we urge is essential to the viable operation of the civil justice system, however, the bifurcated -- or "two-headed monster" -- approach to courts administration will not be effective in today's resource-constricted environment.

The Ontario Law Reform Commission Report in 1973, the Ontarian Government White Paper in 1976 and the Deschênes Report of 1981 all



recommended the transfer of primary responsibility for the administration of the courts to the Judiciary. The Zuber Report of 1987 did not.

The Zuber Report recommended the establishment of an Ontario Courts Management Committee comprised of members of the Judiciary, and representatives of the Ministry and of the Bar and of the Public. The Committee was to be responsible "for setting operational policies for all the courts and provincial standards for the operations of the courts, subject to,

- (a) the ultimate authority of the judiciary in matters relating to assignment of judges, sitting standards for judges, assignment of particular cases and the establishment of sitting schedules: and,
- (b) the ultimate authority of the government of Ontario in matters relating to the budget for the courts, remuneration and working conditions for provincial employees and the geographic locations in which court services [were] to be provided."

This recommendation was not implemented by the Ontario Government.

Two years after merger and regionalization were introduced to Ontario, the Joint Committee's Report on Court Administration was released. This Committee came to a different conclusion than did the Zuber Report, and recommended that the judiciary assume primary responsibility for the administration of the Ontario Courts, in a fashion consistent with that proposed by the *White Paper on Courts Administration* in 1976 and the *Deschênes Report* in 1981. The Joint Committee proposed a two stage implementation program, as follows:<sup>14</sup>

- (i) the immediate implementation of an *ad hoc* court administrative structure whereby the Ontario courts would be jointly administered in all respects by the judiciary and Courts Administration Division of the Ministry of the Attorney

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<sup>14</sup>Joint Committee on Court Reform Report on Ontario Court Administration 1992, *supra*, note 14, pp. 20-26.



General; and,

- (ii) the enactment of legislation, in the medium term, to provide for the judiciary to take responsibility for the Ontario courts and related services through a non-partisan process involving a Courts Administration Council (the governing arm) and an Ontario Courts Service (the civil service adjunct).

The Joint Committee's rationale for this proposal was based upon its belief that there existed a widespread recognition of the seriousness of the problem, and willingness to address it, and upon its conclusion that the inherent conflict in the present structure required fundamental change.<sup>15</sup>

Although Government has not officially responded to the Report of the Joint Committee, there have been a number of recent initiatives designed to advance the concept of co-management of the system. For instance, a Heads of Court Committee has been established which meets regularly to address issues of mutual concern in relation to court administration. It consists of the "heads" of the various Courts in the Province together with the Deputy Attorney General and the Assistant Deputy Attorney General in charge of Courts Administration.

We agree that fundamental changes must be made to the structure which is courts administration. Establishment of a unified system of management, administration and budgetary responsibility, which will eliminate these conflicts to the extent that is possible, is necessary.

The need applies across the justice system in the Province as a whole -- to a structure for both civil and criminal matters. That there is such a need is readily apparent, not only from the numerous Reports and studies relating to the problem already mentioned, but also from our own examination of the system and our

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<sup>15</sup>id at pp. 2-3.

consultation process. As we have previously mentioned, a common theme expressed during that process was the one encapsulated by the question: "Who's in charge here?".

Although the Civil Justice Review is not in a position to recommend a specific structure, we are in a position to understand, and therefore to urge, that any global strategy for the creation of a civil justice system which meets the benchmarks of this Review must include a solution to the problem of bifurcated and conflicting administration. That the problem reaches beyond the civil aspects of the court system alone, and encompasses the whole of the court system, merely heightens the importance and urgency of dealing with it.

We urge that it be done.

What is needed is a structure that incorporates and balances the following key elements:

- (i) judicial independence;
- (ii) strong community input and public involvement;
- (iii) accountability to the public, through the Legislature, for the expenditure of public funds;
- (iv) the ability to attract adequate public funding; and,
- (v) smooth, professional, effective, and efficient management.

## **RECOMMENDATION:**

**We therefore strongly recommend that steps be effected immediately to establish a single issue task force -- comprised of representatives of Government, Judiciary, Bar and Public -- mandated to develop an implementable proposal for the creation of a unified administration, management and budgetary structure for the justice system**

in ontario.

Such a structure must have clear lines of responsibility and accountability for all administrative, all financial and budgetary, and all operational matters within the system; and it must possess at least the following minimum characteristics:

1. It must be consistent with, and guarantee, the preservation of an independent judiciary.
2. It will feature a governing body or council which is broadly accountable and representative of the Public, the Judiciary, the Government and the Bar.
3. To ensure the preservation of an independent judiciary, any decisions affecting the independence of the judiciary will require a majority vote by the judges on the governing body of the new structure.
4. The role of the governing body -- which, as noted, will include Government, Bar and Public representatives as well as Judges-- will be primarily of a supervisory and overall management nature. Day-to-day and direct operational responsibility for the system will be assigned to full time professional court administrators and their staff.
5. The new system must be properly and adequately funded from the outset, to preserve the integrity of the justice system. This is essential.
6. The Attorney General and the Chief Judicial Officers of the province should be members of the governing council, to ensure that they are supportive of, and accountable for, representations made to the legislature. As well, the governing body must be provided with the necessary supportive linkage with Treasury Board to enable it to make effective representations to the legislature.
7. The new system must ensure ultimate accountability to the Legislature for the expenditure of these public funds, and preferably will feature direct reporting to that body and direct approval by it of budgetary matters.

We cannot overstate the importance, in our view, of Government and the Judiciary, together with the Bar and the Public, designing and implementing a unified

and accountable administration structure with the minimum characteristics outlined above. We believe the effective administration of courts in Ontario for the 21st century depends upon it.

## CHAPTER 11

### THE COST OF THE CIVIL JUSTICE SYSTEM

#### 11.1 Cost and Value of Justice

*Justice is such a fine thing that we cannot pay too dearly for it.*

Alain Rene Lesage

The civil justice system costs money.

The "cost" of civil justice accordingly has different faces. Government -- and therefore the public in its taxpaying capacity -- shoulders a major portion of the cost. Litigants, who are at the same time taxpayers, also shoulder an additional cost of the civil justice system. There are institutional or systemic costs on the one hand and user costs in the form of legal fees and administration, on the other hand.

How does one go about assessing these various costs and their impact in order to determine what value the public and litigants are receiving for their money? Are these costs in keeping with an effective, efficient and accessible civil justice system?

These questions are very difficult to answer, partly because very little study has previously been given to them. Having some concept or definition of what the true value of civil justice is to the province and its citizens in this sense, however, could be a useful guide to any assessment of the degree to which that value is actually achieved. No such concept or definition exists at the present time, as far as we have been able to determine.

We do not refer to value in this context in the sense of the qualities of worthiness of the system, but rather in the sense of what might be described in an investment analogy as a return on one's money. Are the public and litigants getting the best return on their investment and expenditure on civil justice? In our

consultations with the public the overwhelming answer to that question was "No". To a lesser extent, the Bar expressed a similar sentiment.

One can catalogue the obvious reasons easily. Most litigants simply want to have their disputes resolved quickly and cheaply, and to move on with their lives. Delays in proceedings are legion, however, and their associated costs enormous. Cost and delay are the twin enemies of the civil justice system.

### **Perceptions**

From wasteful motions through endless discovery to long waiting for pre-trials, trials and appeals, the public perceives the civil justice system to be out of control. Lawyers, too, are frustrated by these impediments. Lawyers are stuck in courtrooms for hours waiting to be heard, forced to charge their clients for at least some of that time, and can only blame the system. Litigants expect to pay something for what happens in court, win or lose. What they learn, however -- if our public consultations are any indication -- is that once they have become enmeshed in the system their destiny is out of control. Too late to get out, they discover that they simply cannot afford the game. They are not only paying to win or lose, they are also paying to wait.

In addition, the public believes that lawyers have an incentive to waste time and effort. The "billable hour", which is the most common basis upon which legal fees are calculated these days, is seen to encourage lengthy proceedings and the inefficient handling of cases. Even a poor job extracts a payment for hours of work at a seemingly exorbitant hourly rate. An advantageous settlement or a successful trial may attract a premium over and above the hourly rate, and although the premium may be justified in the eyes of the lawyer and often by objective standards, the reasons for it may never be properly explained to or understood by the client. As a result, the stereotype of the rapacious lawyer continues to be fed.



The following is a summary of the issues identified by the public during our consultations regarding costs:

- affordability
- waste
- unnecessary complexity
- unnecessary delays
- belief that the billable hour approach to fees for service drives costs up, and an apparent lack of alternatives to this approach (should contingency fees be reconsidered?)
- lack of accountability with respect to the management of the system
- lack of service values
- lack of fairness with respect to access in the sense that middle class people are often excluded by the cost because they are neither eligible for legal aid nor wealthy enough to be able to carry the lawsuit themselves
- Legal Aid itself, and its impact upon the conduct of litigation
- unpredictability
- lack of cost sanctions for abuse or misuse of the system
- lack of incentives to settle
- lack of sensitivity or concern about what it costs people to engage in a lawsuit
- the cost of court proceedings in family matters exacerbating family problems
- lack of control anywhere on costs

Many of these concerns mirror those expressed by respondents in a study conducted by Professors W.A. Bogart and Neil Vidmar in the late 1980's.<sup>16</sup> Relying upon a survey conducted in Montreal, Toronto and Winnipeg by the Legal Research Institute of the Manitoba Faculty of Law<sup>17</sup>, this study reported,<sup>18</sup>

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<sup>16</sup>W.A. Bogart and Neil Vidmar, "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment", *Access to Civil Justice*, Allan C. Hutchison ed., Toronto, Carswell, 1990 [hereinafter Bogart & Vidmar]

<sup>17</sup>Moore, "Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg," in Gibson & Baldwin, eds., *Law in a Cynical Society: Opinion and Law in the 1980's* (1983).

<sup>18</sup>Bogart and Vidmar, *supra*, pp. 36-37.

- that "a majority of respondents indicated that something needs to be done to improve the way the legal system operates, and that the legal system favours the rich and powerful"
- that a majority of respondents thought "that it takes too long to get anything done through the legal process"
- that 44% agreed strongly and 28% somewhat that they "probably wouldn't bother disputing most legal problems because the cost of doing so would be too high"

The same study also reported that 89% of respondents agreed strongly (64%) or somewhat (25%) that "Canada must maintain a good and fair justice system, regardless of the costs". At the same time, 69% agreed strongly (34%) or somewhat (35%) that "Compared to other ways the government spends money, the justice system is a good use of taxpayers' dollars."<sup>19</sup>

Moreover, with respect to the notion of the stereotypical lawyer, Bogart and Vidmar discovered that:<sup>20</sup>

" On the whole, people spoke positively of their experience with specific lawyers. Whatever people may think of lawyers in the abstract, many are willing to speak positively, even at times glowingly, about how a lawyer has represented their interests."

With these varying and conflicting views as backdrop, then, how does one assess the reasonable and acceptable "cost" of civil justice? As Bertolt Brecht put it:<sup>21</sup>

*You want justice, but do you want to pay for it?  
When you go to a butcher you know you have to pay, but you people go to a judge as if you were off to a funeral supper.*

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<sup>19</sup>*Id.*, p. 37

<sup>20</sup>*Id.*, p. 45, and generally at pp. 45-49.

<sup>21</sup>*The Caucasian Chalk Circle*

## 11.2 Factors Driving Up Costs

Many of the factors driving up the cost of justice are the subject of much of this Report. Some are identified, in summary fashion, below for purposes of this Chapter:

- the adversarial premise of the system, particularly in Family Law matters
- backlog, delays
- structure - there is no overriding capacity to manage or control costs; parts of the system work independently rather than interdependently
- bureaucracy - its size and centralized decision-making nature mitigate against cost effectiveness
- fees for service, in particular "the billable hour"
- legislation without impact studies
- the increasing litigiousness of our society
- voluminous and sometimes unnecessary paper, and the handling and storage costs associated with them
- administration fees which do not seem to bear any relation to the cost of providing the service e.g. estate fees
- lack of principles or standards with respect to fees
- the increasing complexity and length of litigation
- the increasing need for resort to "experts" of almost every kind, and the significant cost associated with such consultations (custody and access assessments, medical reports, forensic accounting reports, real estate and appraisal reports, technology reports -- the list is virtually endless)
- under-utilization of available technology (automated court recording/monitoring)
- under-utilization of courtrooms and alternative court room space
- no locus of case responsibility (case management)

- variances in practise directions
- lack of incentives for settlement
- lack of disincentives in the form of sanctions for unnecessarily protracted processes
- the open-endedness of Legal Aid certificates

Legal Aid was identified by the Public, the Bar and the Judiciary as a matter with significant bearing on the cost of the civil justice system. Respondents felt that it encourages unnecessary litigation because it provides few incentives to settle and fewer to be efficient.

This led to another issue involving access to justice. It is important to ensure that access to justice applies fairly to all members of society. There is a particular concern that the middle class, who do not qualify for Legal Aid, cannot afford the costs of litigation and therefore encounter a barrier to access to justice. As well, wealthier members of society can wear down middle-class members since the latter cannot afford to fund lengthier lawsuits.

At the same time, however, the existence of a viable Legal Aid plan is critical to enable low or non-income members of our society to have access to the civil justice system. The cost of Legal Aid, and its impact upon the way in which the system functions, must be balanced against this need.

The cost of Legal Aid, which is funded primarily by the government and, therefore, by the taxpayer, has been steadily and dramatically increasing in recent years. This cannot be ignored as a factor contributing to the increases in cost of the civil justice system as a whole.

The Civil Justice Review recognizes that Legal Aid is a major, and contentious, issue in society today. Others are examining the implications of this debate. We have not endeavoured to duplicate their efforts.

There are two major issues which need to be addressed, in our opinion, however, as we examine the legal aid question. The first is that the Legal Aid system needs to be reviewed, to see if it still works and if it truly does provide the means for low or non-income members of society to enjoy access to justice. The second is to determine the extent to which the public interest calls for the use of Legal Aid to finance private disputes in the courts or through ADR.

A major examination of the Legal Aid system is currently underway by other bodies. We hope to draw upon the results of that examination in making recommendations respecting Legal Aid in our Final Report.

### **11.3 Available Data on the Cost of Justice, and its Limitations**

Without question, the study of what it costs from a public perspective to provide a civil justice system, and of what it costs from an individual perspective to use that system, is an important issue.

On such an important issue, one would expect to find a wealth of research. Surprisingly, there is little analysis or hard data available. This is true not only for Ontario but for most jurisdictions around the world.

The only report we found which warrants the title "study" is one entitled "*The Costs of the Civil Justice System*", written in 1982 by the American Institute for Civil Justice.<sup>22</sup> This study explored the costs of specific types of civil cases in four

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<sup>22</sup>J.S. Kakalik & A.E. Robyn, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*, (Rand Institute for Civil Justice: Santa Monica, 1982) R-2985-ICJ.

jurisdictions in the United States. The authors' introductory comments are most apt, however. They said:

*As with many other long-standing controversies about the civil justice system, however, neither critics nor defendants have much solid evidence to support their views about overall system costs. Anecdotes abound, of course. Each commentator can cite a few instances within his or her own experience, but no impartial institution has undertaken the laborious task of collecting, standardizing and comparing available cost and workload data to evolve overall estimates with some claim to statistical validity.*

The Civil Justice Review has faced similar difficulties. We have reviewed the following sources of data: The Public Accounts of Ontario for 1993-94, the Ministry of the Attorney General Annual Statistical Report 1993-94, and available statistics from the Courts Administration Division of the Ministry of the Attorney General. There are significant limitations in the data available for analysis. Consequently, there are significant limitations on what we have been able to determine, in concrete terms, about the "cost" of justice in Ontario.

In the first place, there are not many reliable statistics available. With the advent of new technologies, better data gathering techniques and statistics are being generated. However, the statistics-creating process is far from perfected.

Secondly, the process of analyzing statistics involves months of work. It also requires the participation of many people, some of whom are part of the government and some of whom are outside of government. These people have to go beyond the statistics to discover information which will allow them to complete an analysis. For



example, they would have to determine at what point cases are actually resolved when those cases have never been set down on the trial list or have disappeared from the system. Without that sort of information, we are dealing only with snapshots at certain end points of a long process, i.e., the number of proceedings commenced and the number of matters disposed of but very little about what happens in between. It is feared, that even those statistics are flawed.

Thirdly, we have found that statistics for even basic information like the number of hours spent in court and the number of cases commenced, vary somewhat depending upon the source document being examined.

Fourthly, the assumptions made by the statisticians who decide what to include and exclude as costs are not always visible to the reader. For instance, it has been variously claimed that case management is less expensive, and also more expensive, than ordinary litigation. We suspect that such conclusions are almost entirely dependent upon what costs are included in the comparison.

Fifthly, many costs for which statistics are kept include both criminal and civil components. No breakdown is available, and any breakdown would require a great deal of work with original source documents, as well as the incorporation of basic assumptions. For instance, Statistics Canada announced in November 1994 that total Canadian Government expenditures on justice rose an inflation-adjusted 3.2%

annually between 1988 and 1992, with Legal Aid doubling in the same period. However, of the 3.2% of which spending on justice represents of total government expenditures, 60% is spent on policing, with Legal Aid totalling only 6% for both criminal and civil litigation combined.

It is not that there is any absence of "numbers" in the system. There are "numbers" everywhere. The problem is, as we will discuss in the section of this Report dealing with technology, that there is no consistent and dependable mechanism yet in place for gathering accurate data to generate reliable management information. The perils of such a situation are well summed up by Will Rogers:

It ain't what you don't know that'll kill you;  
It's what you know that ain't true.

We have placed some emphasis on the frailties and paucity of the data available on the issue of the cost of justice for two reasons. First, it serves to inject an element of caution regarding our conclusions. Secondly, and perhaps of greater importance, it underlines the need for further study to be conducted on this question.

## **RECOMMENDATION**

**We therefore recommend that a research project be commissioned to examine and analyze the question of the "cost" of justice, both from an institutional or systemic perspective and from the perspective of individual litigants.**

The Review would have liked to have constructed a costing model for the civil justice system, based on information available, articulated assumptions and the results

of a costs survey which we conducted amongst lawyers. Unfortunately, because of the difficulties referred to, we have not yet been able to do so. Our efforts will continue, and we hope to be in a position to say more about this question in our Final Report.

#### **11.4 Preliminary Observations**

Notwithstanding the foregoing caveats, our studies to date do enable us to put forward some preliminary observations, and snapshots about current institutional and individual costs of civil justice in Ontario. They point to only the most obvious and easily identifiable parts of the costs issue; however, we believe that this examination of public expenditures is a beginning towards the development of the sort of comprehensive cost model which we hope can ultimately be constructed.

The taxpayer is involved with the civil justice system as both "provider" and "user". We call the former "institutional" costs, and the latter "individual" costs.

##### The Taxpayer as Provider

As provider, the taxpayer supplies government with the funds to keep the civil justice system in operation. One way of measuring this cost, then, is to examine how much money is allocated to the civil justice system in the governmental budgeting process, how those funds are apportioned, and how they compare with total government expenditures. That will be one of our tasks. We will also examine the revenues which are generated by the justice system to give some indication of the "net" cost of the system to the taxpayer as provider.

The same notion can be approached from other perspectives as well. One way is to examine the cost to the taxpayer of providing a trial to litigants, having regard to the facilities, personnel and other infrastructure necessary to make that service available to the public. While this snapshot does not by any means purport to capture the entire picture of the cost of providing the civil justice support structure, it does give some focus to the institutional price of delivering the piece of

the justice system that is most visible to the public i.e., the trial.

Our snapshot image of this aspect of costs is still somewhat fuzzy, because of the limitations on our data to date. We will return to it in our Final Report. In the meantime, we will venture some tentative observations.

### The Taxpayer as User

As a user of the civil justice system, the taxpayer as individual has to absorb the outlay of legal fees, administrative fees, witness fees and other expenses relating to witnesses -- including the considerable cost of experts in the growing number of cases where they play a role -- and other forms of disbursements which must be incurred in the course of processing litigation to its conclusion. These user costs are considerable, sometimes insurmountable. They pose a significant problem in respect of access and the affordability of civil justice. We are able to make some tentative observations about them, based upon a survey of the Bar conducted by the Civil Justice Review, in combination with some other data which is available.

#### **a. Institutional Costs: The Taxpayer as Provider Government Expenditure on the Administration of Justice**

In this context, the focus of our comments is on the price of the administrative/judicial structure for civil justice. The members of the Review recognize that there are other expenditures which can be viewed, in the broad sense, as a part of the cost of justice. They include policy initiatives such as Legal Aid and the Family Support Plan, police services and community programs, to name but a few. Our purpose, however, is to focus the spotlight as far as possible on the infrastructure costs necessary to provide and sustain the machinery of civil justice -- facilities; judicial and administrative personnel, the salaries, benefits and support networks necessary for them to perform their functions, and services, equipment and technology.

These are the elements of the "cost" of justice which are more easily overlooked in the pressure of government budgeting, because they are the aspects of the system which receive the least public attention.

In 1993, the overall budget of the Ontario Ministry of the Attorney General was \$751,753,271. Of the total Ministry budget, only about one-third is allocated to the Courts Administration Division, which is the division of the Ministry charged with the responsibility of running the court system. This amount totalled \$276,226,100 in 1993, excluding funds attributed to administration of the Family Support Plan.

Although the size of the Courts Administration budget has been increasing in absolute terms over the years, its relative share of the Ministry's budget has decreased steadily from 50.71% in fiscal year 1986 to 37.1% in 1994. Put in another context, the Courts Administration budget represents a mere 0.54% of the total Ontario Government budget for the year, a percentage which has remained relatively constant for the past number of years.<sup>23</sup>

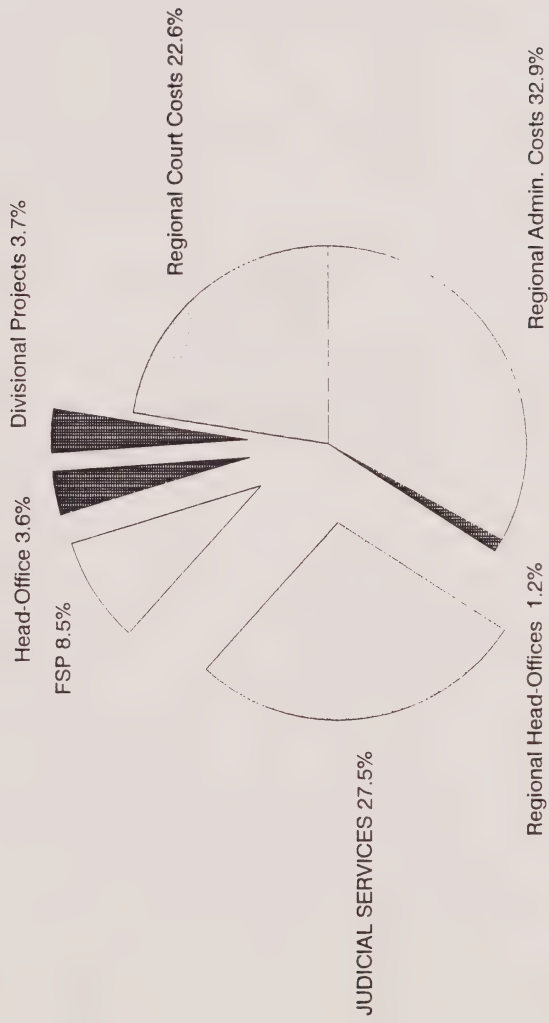
A breakdown of how the monies attributed to Courts Administration are expended is illustrated in Table 1 on the next page.

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<sup>23</sup> Ministry of the Attorney General, Courts Administration Division, Program Development Branch

**TABLE 1**

**1994-95 ESTIMATES ALLOCATION  
COURTS ADMINISTRATION DIVISION**





The "judicial services" portion of this budget includes remuneration of the judges of the Provincial Division who, for the most part, hear criminal and family matters. It does not include remuneration by the Federal Government for the federally appointed judges of the General Division, who hear both civil and criminal matters.

What all of this means, is that approximately \$250 million (including Provincial Court judges' salaries) is made available for the administrative infrastructure which underpins the justice system in the province. The cost to the taxpayer, in this sense, is roughly 1/2 of 1% of what it costs the taxpayer for the government in its entirety.

### **Revenues Generated by the Civil Justice System**

While the justice system cost the taxpayer money, it also generates revenue at the same time through fees collected, fines collected, and monies held in trust.

In 1994, the revenues from the criminal and civil justice systems totalled close to \$397 million.<sup>24</sup> Excluding fines and certain reimbursements received from the federal government, provincial revenues still amounted to approximately \$178 million. One could argue that much of the approximately \$250 million (including Provincial Court judges' salaries) which is made available for the administrative infrastructure underpinning the justice system in the province is attributable to the criminal side of the system and that total receipts from the justice system, including fines, offer a fair measure when comparing costs and revenues. Regardless, the comparison indicates that the civil justice system is not a significant *net user* of public resources overall.

Table 2 below, is a copy of the Statement of Revenue for the Ministry of the Attorney General for the year ended March 31, 1994:

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<sup>24</sup>\$396,605,588.00. See Ontario Public Accounts, 1993-1994, Ministry of the Attorney General, Statement of Revenue.

Table 2

**PUBLIC ACCOUNTS, 1993-94**  
**MINISTRY OF THE ATTORNEY GENERAL**  
**STATEMENT OF REVENUE**  
**for the year ended March 31, 1994**

	1994 - \$	1993 - \$
<b>GOVERNMENT OF CANADA</b>		
Reimbursements of Expenditures		
· Legal Aid	34,644,834	33,184,834
· Criminal	15,906,722	16,416,083
· Civil	6,976,738	5,753,351
· The Young Offenders Act	3,529,715	3,405,920
· Criminal Injuries Compensation Board	696,586	708,135
· Native Court Workers	336,858	659,240
· French Language Services		
	62,091,453	60,127,563
<b>REIMBURSEMENTS OF EXPENDITURES</b>	11,752,622	13,815,450
· Public Trustee	2,314,791	621,654
· Accountant, Supreme Court of Ontario	511,320	553,750
· Metropolitan Toronto (Metropolitan Police Force Complaints Project)	162,964	295,501
· Official Guardian	42,225,372	28,260,480
· Family Support Plan (Maintenance Payments from Deserting Parents)		
	56,967,069	43,546,835
<b>FEES, LICENCES AND PERMITS</b>	60,854,668	51,729,522
· Local Registrars - Estates	38,084,934	41,012,088
· Local Registrars - Other	25,272,057	24,403,799
· Sheriffs	11,482,372	6,048,561
· Provincial Courts (Civil Division)-clerks, bailiffs	875,311	1,161,087
· Unified Family Court	2,045,167	0
· Assessment Review Board	656,602	381,385
· Other		
	139,271,111	124,736,442
<b>FINES AND PENALTIES</b>		
· Provincial Courts	111,644,130	146,361,610
· Criminal Division	9,674	30,049
· Family Division	639,466	555,472
· County and District Courts	486,903	473,026
· Estreated bail	122,900	47,910
· Unclaimed bail and restitutions		
· Supreme Court of Ontario		
	112,903,073	147,468,067
<b>SALES AND RENTALS</b>		
· Photocopies	249,016	228,392
· Transcripts	4,043	8,313
· Other	12,918	6,011
	265,977	242,716
<b>RECOVERY OF PRIOR YEARS' EXPENDITURES</b>	306,381	231,936
<b>MISCELLANEOUS</b>		
· Public Trustee - escheated estates	1,658,294	516,619
· Outstanding cheques and unclaimed monies	1,000,808	313,921
· Court Awarded Costs	530,569	131,412
· Interest	202,073	118,189
· Public Trustee - Investment Account	7,500,000	-
· Other	1,908,780	1,022,163
· Accountant - OC -suits support account	12,000,000	0
	24,800,524	2,102,304
<b>TOTAL REVENUE</b>	<b>396,605,588</b>	<b>378,455,863</b>

For policy reasons, revenues generated by the system are not attributed to the system when decisions are made about how monies are to be allocated. The revenues earned do not go back into the justice system; they go into the government's Consolidated Revenue Fund. It is neither our mandate nor our purpose to debate the policy behind this approach to budgeting. Obviously, there are ministries and government services which are important to the public welfare and which do not generate revenues. To base their funding on a net accounting approach would not be fair.

At the same time, we believe it to be unfair to ignore completely the revenue aspects of the justice system in determining what its appropriate share of government funding should be. The administrative infrastructure of justice is not a significant net drain on the public purse. Consideration might be given, it seems to us, to re-directing some of those revenues, at least notionally, to modernizing and retro-fitting the civil justice system for the rest of the 20th and into the 21st century. At the very least, any savings that may be attributable to the re-design and re-organization of the system should be available to finance the changes necessary to bring about that re-design and re-organization.

### **What does it "Cost", Institutionally, for a Trial?**

Attempts have been made to determine the cost of a trial to the taxpayer. Such a statistic would be useful because it would shed some light on the public price of justice through the prism of what is the most visible part of the system to the public -- a trial.

We have endeavoured to gather accurate data and information about the total cost to the taxpayer of a civil court action, taking into account not simply the time spent by administrators and judges in performing the various functions, but also the capital cost of owning and leasing buildings and equipment, the cost of supplies and services, and salaries. This has proved to be an enigmatic task. We

are continuing to work on it, and reserve our substantive comments on it for our Final Report.

We note that a study has been done, in the context of the case management pilot projects, which focuses primarily on the "administrative costs for staff" of a case proceeding to a three-day trial.<sup>25</sup> This study dealt with such costs in terms of the *time expended* by administrators and judges in the processing of nine different steps in a lawsuit, ranging from the processing of the pleadings through the pre-trial to trial. The administrative cost, in these time terms, was estimated to be approximately \$2500-\$2600.

There are other costs to the taxpayer which must be included in arriving at a true picture of the cost of the administrative and judicial infrastructure underlying a trial, however. We have listed them above as facilities, supplies, equipment, services, salaries. While the Ministry has data available in the form of courtroom utilization statistics and other costing, the data is not in a form which makes it easily formulated as the "cost of a trial". What data is available, not surprisingly, indicates that when such costs are included in the cost of trial the figure is quite substantially larger than the \$2500-\$2600 referred to above -- perhaps as high as \$20,000. The analysis lying behind these initial indications is very limited, however, and consequently we can only put forward this latter estimate in a very tentative way.

There will be more about this aspect of the cost of litigation in our Final Report.

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<sup>25</sup> *Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice*, A Report to the Courts Administration Division of the Ministry of the Attorney General, November 1993, Appendix E.

**b. Individual Costs: The Taxpayer (and other litigants) as User**

(i) The Model of the Three-day Trial

What is the cost of the average three-day trial to a litigant, individually? Having paid once for using the system as a taxpayer, the litigant must pay an additional time for the "private" costs of a lawsuit. These individual expenses can be substantial.

Their major element is lawyers fees. The following table illustrates the estimated costs of a three-day trial in the Ontario Court of Justice (General Division). They amount to over \$38,000.

**TABLE 3: COST OF THE TYPICAL CIVIL CASE TO LITIGANT**

***(assuming the plaintiff's side through a three day  
General Division Trial and a solicitor's time at \$200.00 per hour)***

**Steps:**

Initial interview, information gathering and research:	10 hours
Draft Statement of Claim:	5 hours
Prepare and Finalize Affidavit of Documents:	10 hours
Assume two motions (including prep):	15 hours
One cross-examination on Affidavits (one day plus prep):	15 hours
Discovery (two days plus prep):	25 hours
Pre-Trial:	10 hours
Notices including Request to Admit:	5 hours
Trial Preparation:	30 hours
Trial Time:	30 hours
Miscellaneous letters, telephone calls, reports (assume one hour per month over 3 years from start to finish):	36 hours
<b>TOTAL</b>	<b>191 hours</b>
<b>191 Hours at \$200.00</b>	<b>\$38,200.00</b>
Plus Disbursements	
Plus G.S.T.	



"Plus disbursements" may appear to be an innocuous addition to this list. It is not. Disbursements can be very substantial. We have been advised, for instance, that the disbursements in a simple uncontested divorce proceeding usually exceed the amount of the legal fees. In other instances, the cost of retaining experts or preparing drawings or surveys -- to name but a few examples - can run into the many thousands of dollars. In addition, the litigant must pay 7% G.S.T. on fees and disbursements.

(ii) A Survey of Lawyers' Fees

The Civil Justice Review commissioned a survey of the private Bar in an effort to gather more substantive information about costs to litigants. 8,300 surveys were sent to civil litigation practitioners around the Province. A response of 521 completed surveys (6.3%) -- a statistically valid average -- was received.

The demographics of the respondents were as follows:

- average year of call was 1981/82
- 38% practised in Toronto
- 16% (mostly Toronto) practised in firms of 51 lawyers or more
- 79.5% devoted at least half of their practice to civil litigation

These demographics appear to be representative of the civil Bar in Ontario.

The average hourly rate was \$195.00.

The responses indicated that the median of the largest bill for judge and jury trials in the last two years (only 16% responding) was \$38,500.00. This compares almost exactly to the estimate set out in the Table above, which was prepared quite independently of the survey. 85% of respondents said that less than 1/4 of their bill was due to systemic delay.

Interestingly, most lawyers reported that litigation was usually about matters relating to breaches of contract (86%), rather than family law (71%) and small claims court proceedings (68%).

Another interesting survey relating, at least indirectly, to lawyers' fees was conducted for the Simplified Rules Sub-Committee. It examined party and party costs in a random sampling of 98 court files from six different court centres in the Province.<sup>26</sup> This survey reveals that the average claim in the General Division is approximately \$197,000; the average judgment is approximately \$58,000; the average allowance of party and party costs, approximately \$8,500. In terms of "medians", as opposed to "averages", the median claim is approximately \$32,000; the median judgment is approximately \$15,000; the median award of party and party costs is approximately \$4,300.

Keeping in mind that the foregoing figures represent only the costs awarded to one of the litigants, and that those costs are only a portion of what that litigant pays to counsel, the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about 3/4 of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained.

Clearly, these costs to individual litigants can be a barrier to access to justice. Many of the recommendations which we have made elsewhere in this Report will help to alleviate the pressures associated with legal fees -- the caseload management framework, technology initiatives, reforms to the discovery and motions processes and the various alternative dispute resolution techniques, to name a few. In addition, we believe, the profession needs to re-examine the way

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<sup>26</sup>Party and party costs are not the costs that a client pays to a lawyer. They are costs which are awarded by the court and which are payable by one party to another. "Party and party" is a scale of costs which represents, usually, somewhere between 40% and 50% of the amount paid by a client to the lawyer. They are intended to be partial indemnity only, and when not agreed to are "assessed" by assessment officers connected with the Court.

in which it charges its clients for the services it renders. Are there alternatives to the billable hour? Should contingency fees -- one obvious form of alternative that was urged upon us frequently during our consultation phase -- be permitted as an option?

The billable hour has evolved as the cornerstone of legal billing practise only over the past 15 to 20 years. Prior to that time the profession managed to operate effectively on other bases, such as value billing, block billing, or some other form of pre-set billing or agreement for the billing of fees. Presumably it is not impossible for these concepts to work again. This does not mean, necessarily, that other forms of billing will solve the issue of access or result in significantly reduced legal costs. The real savings may come from the streamlining of the system and the implementation of a more efficient process.

Ironically, the concept of the billable hour developed in response to a demand from clients that lawyers "account" for their time, in order to justify the amount that they charged. Now the billable hour is seen in some quarters as a factor driving fees to unaccountably high amounts. As we have mentioned earlier in this Chapter, the public is skeptical that lawyers are tempted to prolong proceedings such as examinations for discovery in order to enhance their billable hours. At the same time, the billable hour is an effective way of monitoring the amount of time a lawyer is spending on a file. In addition, it has become an important tool for the internal management of legal businesses.

Contingency fees -- an arrangement where the lawyer and the client agree in advance to share the proceeds of the lawsuit, if any -- is a popularly offered alternative to the billable hour. It is popular with the public, which sees it in simplified "no win-no pay" terms. It is popular with some members of the Bar, who see it in an entrepreneurial way as an opportunity to earn significant fees. It is seen, from both perspectives and in other quarters as well, as a way of providing access to civil justice for those who have meritorious cases but cannot afford to

litigate them and who are not eligible for Legal Aid.

Ontario is the only province which does not allow some form of contingency fee arrangement, except for class proceedings. In 1988, the Law Society of Upper Canada approved adoption of contingency fees in principle, subject to certain safeguards for the public. However, legislation is necessary to permit such an arrangement between lawyers and clients and the necessary amending legislation has not been enacted.<sup>27</sup>

We believe that it is time to re-visit the concept of contingency fees as a possible means of improving access to justice. There are, however, a number of issues to be addressed, including:

- whether contingency fees would, indeed, increase access to civil justice;
- whether they would result in an overall cost saving;
- whether matrimonial and criminal matters should be excluded from the concept
- the safeguards that need to be put in place for clients, with respect to the reasonableness of the fee;
- whether there should be limits on the percentage or recovery that may be agreed to as a fee.

We believe that all of these questions respecting alternatives to the way in which clients are charged for legal services need to be examined, in our view.

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<sup>27</sup>Section 28 of *The Solicitors Act* R.S.O. 1990, chap. S.15, prohibits a lawyer from purchasing any interest in litigation or making payment dependent upon success.

**RECOMMENDATION:**

**We recommend that a working group be established, in conjunction with the Law Society of Upper Canada, for the purpose of addressing the issues involving legal fees and making recommendations to the Civil Justice Review in that regard for purposes of its Final Report.**

**11.5 "Court Costs" and the Imposition of Sanctions**

Courts have the inherent jurisdiction to award or refuse to award costs, and to use the cost sanction to control their process and to prevent abuse of that process.<sup>28</sup> This discretionary authority is supplemented by the provisions of *The Courts of Justice Act*, s. 131 and Rule 57 of *The Rules of Civil Procedure*.

There is a growing frustration amongst judges, lawyers and members of the public at what is perceived to be the increasing number of prolonged or unnecessary proceedings. Sometimes it is the lawyer who is blamed, sometimes the client, sometimes Legal Aid. The Review was urged on many occasions, by representatives of all three of the foregoing groups, to recommend that Courts be more vigilant in imposing costs as a sanction against conduct leading to such proceedings.

In the Canadian system of civil justice, costs are generally awarded to the

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<sup>28</sup>*Young v. Young*, [1993] 4 S.C.R. 3

successful party. Generally, as well, those costs are ordered on the lower party and party scale that we have referred to above, as partial indemnification to the successful party for the expense of the litigation.<sup>29</sup>

On occasion, costs will be awarded to a party on what is known as the "solicitor-client scale". Such costs should not be confused with what a client must pay his or her own lawyer. Solicitor-client costs are costs as between the parties to the lawsuit, but they are costs at a higher scale, designed to provide the recipient with "complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding, but ... not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary".<sup>30</sup> Costs are awarded on this scale as an indication of the Court's disapproval of the conduct of a party with respect to litigation, but are "reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious" or, basically, where the Court feels the successful party ought not to have been put to any expense for costs in the circumstances.<sup>31</sup>

Thus, the imposition of solicitor-client costs against a party is one method

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<sup>29</sup>See M.M. Orkin, *The Law of Costs*, 2nd ed. (Canada Law Book Inc.: Aurora, 1994), pp. 2-14.

<sup>30</sup>See the decision of Henry J., in *Apotex Inc. v. Egis Pharmaceuticals* (1992), 4 O.R. (3d) 321, at pp. 324-328 for a general description of the principles underlying the awarding and fixing of costs.

<sup>31</sup>*Id.*, p. 325.



in which the court may exercise its discretion to impose a sanction for unacceptable conduct in the pursuit of litigation.

The award of costs for this purpose is not limited to an award in favour of the successful party. Even where the party has been successful, the Court may deny that party costs or even award costs against a successful party, in exceptional circumstances. Such circumstances might include situations involving misconduct of a party, miscarriage in the procedure or oppressive and vexatious conduct of proceedings.<sup>32</sup>

In addition, costs may be awarded against a solicitor or counsel personally, where he or she has been responsible for an abuse of process. This is a jurisdiction which Courts exercise cautiously because it raises difficult questions about the duty of lawyers to advance their clients' cases fearlessly and about solicitor-client privilege (which might need to be pierced in order to determine the reasons for counsel's conduct). Nonetheless, courts have awarded costs against solicitors personally in countless cases. It is a power which many have urged on us should be utilized more.

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<sup>32</sup>Orkin, *supra*, note 39, pp. 2-23 through 31.

The Supreme Court of Canada has recently revisited the principles upon which this jurisdiction may be exercised. In *Young v. Young* Madam McLachlin said:<sup>33</sup>

..The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.

... But the fault that might give rise to a costs award against [the solicitor] does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

It is apparent from all of the foregoing, then, that courts are equipped with the necessary jurisdiction and authority to impose cost sanctions, of varying degrees, on parties and their lawyers in appropriate cases. There appears to be a growing sense amongst the members of the public, the Bar and the judiciary that these powers should be exercised more vigilantly in what seem to be an increasing number of prolix, prolonged and unnecessary proceedings.

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<sup>33</sup>*Young v. Young*, [1993], 4 S.C.R. 3 (MacLachlin at p. 135-6).

We agree that trial judges should be alert to, and prepared to utilize their authority in this respect -- always subject to the cautionary caveats expressed above. We also urge members of the profession to be alert to their obligations in this respect, and to impress upon their clients the necessity of avoiding frivolous and unnecessary proceedings. Society can no longer provide unlimited time and resources for the disposition of lawsuits, given the reality of fiscal and other constraints. What was once thought of as everyone's "right to their day in court" may still be a valid and important concept; it does not mean the right to everybody else's day in court as well, however.

As one judge has put it:<sup>34</sup>

... The costs sanction is one of the only ways in which the court can protect the integrity of its process in the particular case, and act as a signal to other litigants of what is required of those who wish to have the benefit of the use of our courts to resolve disputes.

## 11.6 Forward Challenges

As this Chapter on Costs has illustrated, there are many aspects to the "cost of justice" and much still to be done to grapple with the challenges raised by the questions surrounding them.

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<sup>34</sup>*Singh v. Singh* (1992), 10 C.P.C. (3d) 42, (Ont. Ct. Gen. Div.), per Feldman J.

Some of the fundamental challenges facing the system in the future include:

- (i) development of an accurate management information data base to enable the various aspects of the "cost of justice" to be analysed and improvements effected;
- (ii) how savings, if they are found, can be redirected to enhance the effectiveness of the civil justice system;
- (iii) how the civil justice system should compete for and protect its resources.
- (iv) how Courts Administration can isolate and justify financial requirements to preserve the system;
- (v) how access to the system on a timely and affordable basis can be assured for those who do not qualify for Legal Aid;

It is the intention of the Civil Justice Review to continue to pursue these questions and the numerous questions posed, but not fully answered, in this First Report as part of our implementation strategy. We will have further comment in our Final Report.

## CHAPTER 12

### BACKLOG

"Backlog", like an achilles heel, is bringing the civil justice system to its knees. It is the major manifestation of delay, and the costs which accompany that delay, in the system.

The backlog must be attacked separately, and eliminated, if other measures taken to address the more effective processing of civil cases -- such as caseload management -- are to be successful.

There are 9,000 civil cases on the pending trial list in Toronto. In Brampton, the number of cases on the list for trial has increased by almost 450% since merger in 1990, and in Ottawa the comparable figure is an increase of over 600%!<sup>45</sup> Windsor, Whitby and Newmarket are other crowded urban centres where the problem is particularly acute. Indeed, across the Province generally, the size of the pending trial list has approximately doubled in that same period.<sup>46</sup>

Unreasonable delay, we noted at the outset of this Report, is "the enemy of justice and peace in the community." The inordinate delay, the increased costs, the almost certain frustration and cynicism, and the emotional strain for participants and litigants which accompany such backlogs are undeniable. They must be addressed and eliminated as part of the overall plan for restructuring the civil justice system, and retrofitting it for the 21st century.

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<sup>45</sup>Report of the Advocates' Society Civil Litigation Task Force Subcommittees for Central West and East Regions, October 1994.

<sup>46</sup>Court Statistics Annual Report, 1993-1994, Ministry of the Attorney General, Program Development Branch.

Coping with backlogs has been a growing occupation for judges, lawyers, and court administrators in recent years. It raises vexing difficulties, not the least because it invariably means the diversion of efforts from current directions. What is the best strategy for dealing with the backlog ? Where are the resources to be found ? What, for that matter -- and this is an important question to be addressed at the outset -- do we mean by "backlog" in the first place ?

We turn to these issues now.

### **12.1 Defining "The Backlog"**

No civil justice system can provide instant trials. We believe the public recognizes, that there must be some reasonable period of time between when a case is truly ready for trial and the time of trial. Thus, there is, a distinction between the general "delay" in processing a case from beginning to end -- the period of time, or delay, which is of greatest concern to the public -- and the time that a case must wait to be reached for trial after it is ready to proceed and has waited that reasonable waiting period of time.

It is in this latter context that we use the term "backlog". In this sense, backlog is a defined term utilized for the purposes of assessing and managing trial caseload.

What is the reasonable period of time between when a case is ready for trial and the time of trial?

In Chapter 13 dealing with caseload management, we have recommended that Ontario adopt general time standards for the disposition of cases. The recommendation proposes a period of 6 to 9 months as the criteria for the waiting span between settlement conference and trial. There should similarly be a standard for defining the backlog, in our opinion. We believe a reasonable period is 9 months.



**RECOMMENDATION:**

**We therefore recommend that the notion of "backlog" be confined to those cases which are truly ready for trial and which have been in a state of readiness awaiting trial for a period greater than 9 months.**

Current statistics for the backlog of civil trials based on available eight month and twelve month aging statistics are found in Chapter 4.3 dealing with "Trends".

**12.2 Identifying the Backlog**

Having *defined* what "backlog" is, the next important step in dealing with the problem is *to identify* those cases easier which constitute it. This involves more than simply determining the names or file numbers of the inventory. It involves implementing a procedure to determine how much of that inventory is made up of cases that are truly waiting to be pre-tried or tried -- *shaking out the system*, as it is sometimes labelled. Only in this way can the actual size and makeup of the backlog be determined.

How many of the cases have already been settled, for example ? A recent experiment in Toronto, involving approximately 1400 of the oldest cases on the list revealed that over 70% of those cases had already been resolved (sometimes long ago) and, indeed, that some had already been tried! Ottawa has discovered a similar phenomenon.

The Toronto experiment marked the first stage of a planned attack on the backlog in the Toronto Region, worked out in co-operation by the Judiciary, Courts Administration and the Advocates' Society. The files relating to the 1,405 oldest cases in the system -- those set down for trial before December 1, 1991 -- were pulled. Letters were sent to the parties or their counsel requesting a status report. The initial response indicated that about 840 cases were closed, although the court had never been notified or its records did not capture that fact. Of the remaining

cases, approximately 275 had already been pre-tried and given dates for trial. The balance were invited to attend a hearing before a judge to review the status of the matter. A large number of those cases as well, it turned out, had previously been settled, or had settled as a result of the notices being sent.

The exercise of shaking out the list, by purging it of dead cases and nudging the parties to do something about the ones that are still alive, is an essential first step in any attempt to address the backlog. *It is frequently observed that cases are resolved when the lawyers and the parties are required to deal with them. The current Toronto and Ottawa efforts regarding backlog have confirmed, again, the accuracy of this observation.*

In short, the "shake out" method reduced the "backlog", represented by those 1405 cases, by approximately 90%. What remains for pre-trial and ultimately, where necessary, trial, are the most difficult of the cases. If what appears to be the universal experience is the case -- namely, that only 3% to 5% of cases are actually tried -- then more of these cases will be resolved prior to an actual or full trial.

We think that this method of identifying and shaking out the list of backlog cases has much to commend it. It weeds out the cases which need not proceed to a pre-trial and/or trial, and it does so without inordinately draining scarce judicial resources. At the same time the shake out method requires the dedication of staff and resources to carry out its mechanics, together with an assured block of trial time at the end of the process to guarantee the disposal of the cases which have to be tried.

That identifiable block of trial time is also indispensable in providing the ultimate incentive for resolution. As many counsel and judges noted, during our consultations, "there is nothing like the certainty of a judge and a courtroom to cause a case to settle."

The phenomenon of a large number of cases remaining in the system, sometimes long after they have been settled, struck us as odd and surprising. Rule 48.12 of the Rules of Civil Procedure places a duty upon every party to an action, *whether it is placed on a trial list or not*, to inform the registrar *promptly* of any settlement. The Toronto experience, described above, and similar experiences in attacking backlogs in Ottawa and Windsor, indicate that this duty is not being performed in many instances. The practising Bar has an obligation to ensure that it is.

This is not simply a matter of a few clerks having to shuffle a few more papers around. It is a matter of the Administration having to provide the storage and retrieval infrastructure for a very large number of files across the province, at considerable expense to the public. Moreover, it is very difficult to plan, and to manage, an attack on the backlog -- or to manage the processing of cases on a continuing basis, apart from the backlog -- without an accurate grasp of the cases which are truly in the system waiting for trial.

**We take this opportunity to remind the Bar of its obligations under Rule 48.12 to notify the court of any settlement. The relevant Bar organizations -- the Law Society of Upper Canada, the Advocates' Society, the Canadian Bar Association of Ontario, and the County and District Law Associations -- should take steps to educate their members and ensure better compliance with this duty. It may be that the Rules should be amended to provide a cost sanction of some form for those who fail to comply.**

### **12.3 Dedicated "Backlog" Teams**

The experience of most jurisdictions in the United States and Canada that have engaged in backlog reduction programs, and the literature on the subject, all indicate that the backlog should be addressed in a dedicated fashion, and separately from the ongoing flow of new cases.

We agree with this proposition in terms of the development of a special strategy to deal with backlog and in terms of the dedication of specific resources to alleviate the problem. However, it is important to note that the efforts to eliminate backlog must not be isolated completely from what is being done elsewhere in the system. They must be viewed as a part of the overall strategy for the improvement of the civil justice system, and integrated into that strategy. Their costs represent transition financing as part of the global strategy of implementing the new system.

In Toronto and in the East Region there are currently backlog reduction programs under way -- in co-operation with the Advocates' Society's efforts in this regard -- and in Central East and Central West Regions proposals are afoot for doing so. They are each somewhat different. What follows is a brief description of what is proposed or under consideration in these areas.

### Ottawa

In Ottawa, it is proposed that there should be a running Civil List. Those putting forward the proposal estimate that to resolve the backlog within one year, six judges must be made available to work exclusively in sittings of four to six weeks, on the Civil Non-Jury List. Judges from other parts of the East Region should be asked to participate in this process, and consideration should be given to sending cases out of Ottawa to court locations within easy driving distance of the city. At least two anticipatory appointments be made now, the proposal recommends, for those judges going supernumerary in the near future.

The proposal also recommends that six law students or associate lawyers, funded by the province, be selected to examine all case files from the trial list and provide summaries of the issues involved, in order to determine the true extent of the backlog. This will also help to identify cases that have been settled. Forty-eight senior lawyers will then be selected to conduct pre-trials based on their experience in the claim categories. A schedule will be set up for a two week period with a goal

of hearing 288 pre-trials for the period. One trial judge will be involved at these sessions to oversee the operation and sign any orders. A statistical record will be kept of the disposition of the pre-trials. If successful, an additional 9 two-week programs would be needed to deal with the backlog list.

Assuming a running trial list for those cases that will not or cannot settle, the proposal predicts that the backlog can be eliminated by the end of 1995, if its recommendations are accepted.

We believe that the mediation initiative, involving judges and senior members of the Bar and presently being experimented with, should continue.

### Toronto

A backlog elimination team made up of judges, lawyers and administrators is developing and implementing a plan to attack the backlog. Techniques will be agreed upon and dates set for implementing each stage of the attack. The techniques under consideration include:

- a) Settlement blitzes by lawyers, with senior lawyers acting as mediators/facilitators;
- b) Settlement blitzes by judges;
- c) Use of ADR for cases suitable to mediation or arbitration
- d) Implementation of a trial blitz, in April 1995, during which the court will suspend its usual business and focus on the trial of backlogged cases.
- e) The implementation of improved trial scheduling practices including: the adoption of consistent and stringent adjournment policies; the establishment of optimal trial capacity of the court; the separation of long trials from shorter trials, by list, and the establishment of "disincentives" for the behaviour of counsel which is counterproductive to ensuring firm trial dates.



### Central East

The proposal of the Advocates' Society Central East Region Subcommittee identifies the need to clean up the list to determine how many cases on the list are settled or are actually "ready". It is suggested that this could be facilitated by asking counsel to file updated pre-trial memoranda. The backlog of civil cases needs to be shared throughout the Region equally. Two centres where the criminal caseload is not as severe could be used to experiment. One could try a "fixed trial" system. Case management could be attempted. Civil sittings from some courts could be cancelled and transferred to other courts. The following year, the cancelling court would be the beneficiary of the extended sittings. The civil rules should be amended to allow cases to be transferred to other locations where court and judge time may be available. Judicial downtime arising from criminal pleas at the last moment could be used to try all cases identified as requiring less than two days; a list of these would be established from pre-trials. This would require coordination and cooperation of counsel to be ready on relatively short notice. Another experiment could be to assign cases "to the week of". Costs sanctions need to be made more effective in curbing counsel's waste of the court's time. Pre-trials must continue and the Bar can provide private pre-trials. Masters should be reinstated to free up judge time.

### Central West

The Advocates' Society Civil Litigation Task Force Subcommittee in Central West Region reports that there is no serious backlog problem in the Region, except in Brampton (Peel) where, as noted at the outset of this Chapter, the growth of the backlog in recent years has been startling. The Subcommittee recommends that the following steps be taken immediately to deal with the Peel backlog situation:

- a) assignment of more judges to Peel and the prompt filling of vacancies as they occur;



- b) requiring litigants to move to other centres, such as Milton or Orangeville, where lists are more manageable, to have their cases tried;
- c) instituting a mini-trial process;
- d) using senior practioners to conduct pre-trials;
- e) Imposing cost sanctions for lack of preparation for pre-trials, failure to comply with undertakings or lack of disclosure at pre-trial;
- f) utilizing a trial audit system for family law cases;
- g) transfer of staff to ensure that the support needed for additional trials is available;

We believe these backlog initiatives and programs should continue. However, we also recommend that a general backlog reduction program be devised for the Province as a whole, implemented in those areas where there is no existing program in place, and integrated with any existing programs.

#### 12.4 The Elements of a Successful Backlog Elimination Program

The elements of any successful backlog elimination program have already been discussed. In summary they consist of,

- a) *identifying* the cases which have been pending for more than 9 months;
- b) *shaking out* those cases to determine which of them actually remain to be sent for pre-trial and/or trial;
- c) *pre-trying* those that do; and,
- d) providing the *certainty of available judicial resources and facilities to try* the remaining cases which do not settle after a proper pre-trial process.

While elements (a) and (b) are essentially matters to be dealt with locally, and elements (c) and (d) may be as well, we believe that the magnitude of the backlog

problem in the major centres across the Province requires a province-wide approach to eliminating it.

### **RECOMMENDATION:**

**We recommend that two dedicated teams -- a trial team, and a pre-trial/settlement team -- be created for purposes of pre-trying and trying, the backlog cases in the court centres around the province where this is needed most.**

**We recommend that the trial team be drawn from existing judicial resources.**

**We recommend that the pre-trial/settlement team be comprised of a group of recently retired judges and senior members of the bar.**

- **The Trial Team**

A team of 8 to 10 judges from across the Province should be created for the express and dedicated purpose of trying the backlog cases that remain to be tried after the identification, shake out and pre-trial phases of the program.

We recognize that this proposal will place a great strain on the utilization of judicial resources because in reality there is little, if any, slack available in the allocation of those resources at the present time. Judges who are assigned to the backlog team will not be available to perform other tasks. This may well make the judiciary's ability to keep up with its current workload unachievable.

However, elimination of the backlog, which is the greatest single source of delay in the system, warrants priority, in our view.

It is not our role to suggest to the Chief Justice and the Senior Regional Justices how and from where judges will be withdrawn from existing duties and dedicated to the backlog team. Such decisions fall squarely within the ambit of the

judiciary. However, we believe that an equitable sharing of this burden as between the Regions is important.

- **The Pre-Trial Team**

Currently, judicial resources simply do not exist to enable the creation of both a backlog trial team and a backlog pre-trial team from that source. The assured availability of trial judges to conduct trials when the cases are scheduled to be tried is essential. Therefore, the pre-trial team must be assembled from other sources.

There are a number of possibilities, but the one we favour involves tapping into the existing pool of recently retired judges in Ontario, if they can be persuaded to participate. Recently retired judges have a great deal of experience, and their reputation still carries with it the mantle of being a judge. These characteristics make such persons ideal for the process of pre-trying and preparing a case for trial. Where necessary, this pool would be supplemented by senior members of the Bar.

#### **RECOMMENDATION:**

**We recommend that a fund be created for the purpose of retaining a group of recently retired judges, and senior members of the bar if necessary, to act as an advance pre-trial/settlement conference team for the backlog cases.**

**This team would work with the backlog trial team in developing and carrying out a plan to attack and eliminate the existing backlogs across the province. Its members would pre-try, mini-try, mediate and make all reasonable efforts to settle those cases in order to avoid the need for trials. For those cases which need to be tried, and which cannot be settled, they would conduct trial management conferences in order to prepare the case for as short and effective a trial as possible.**

## 12.5 Some Considerations for the Federal Government

- **Prompt Filling of Vacancies**

There is another factor which is important in this context. We have mentioned it before. Presently in Ontario, all available judicial resources, including the supernumerary judges, are committed to "front line" tasks. "Reserves" are a non-existent luxury, and accordingly there is very little room to manoeuvre in finding judicial resources to perform special tasks. *As a result, it is absolutely imperative that the Federal Government fill vacancies forthwith as they occur.*

Delays of 6 months or more are not uncommon in the appointment of new judges to fill vacancies which have arisen. Six months may not appear to be a long period of time, however, the failure to fill just two vacancies for a six month period deprives the Court of the equivalent of one full time judge for a year. A great deal can be done by one full time judge, in one year. Such a loss is felt in any Region, but in Regions with fewer judges the loss is particularly burdensome.

Very few vacancies occur unannounced in advance. With the screening process which the Federal Government has put in place to ensure that a pool of qualified candidates is available for appointments. There is no reason why vacancies cannot be filled virtually simultaneously with their occurrence. For the system to function adequately, in these days of scarce resources, this must be done.

### **RECOMMENDATION:**

**Accordingly, we recommend and urge the Federal Government of Canada to respond promptly by appointing new judges to fill judicial vacancies immediately upon their occurrence.**

- **"Anticipatory" Appointments**

There is a second way in which the Federal Government could assist in ensuring that there is a full complement of judges to conduct the Court's business. It has been referred to as the "anticipatory appointment".

The "anticipatory" appointment involves the filling in advance of vacancies which will occur in the reasonably foreseeable future because of judges becoming eligible to elect supernumerary status. Instead of awaiting the day when such eligibility occurs, the appointment is made now.

This suggestion requires those judges who will choose "supernumerary" status to notify the government well ahead of the time when they can do so, and it does entail additional short term costs to government to make such appointments. However, its strength is that *it creates an additional supply of judges on a short term basis*, and it does not require a permanent addition to the number of federally appointed judges allocated to the province of Ontario.

It is a suggestion which, in our view, is particularly apt to alleviate the immediate pressures caused by the inordinate backlogs currently clogging the civil justice system in the Province.

To take one example only, there will be 6 judges in the East Region entitled to elect supernumerary status over the next 3 years. Ottawa is a centre where backlog pressures are particularly intense. If anticipatory appointments were to be made in that Region, there would be three additional judges who could be assigned to deal with backlog cases.

While such a measure would require additional immediate expenditures by government, *it would save money in the long run*. The backlog, and all of the direct and indirect costs and strains which are embedded in it, would be eliminated.

Furthermore, it would be eliminated without the need to draw judicial resources away from other civil matters or from criminal matters. In this latter regard, we note the reappearance of signs that the criminal lists in some quarters are beginning to approach pre-*Askov* levels. Should this possibility become a reality there will be pressure to transfer judicial resources from the civil side to the criminal side, a re-allocation of resources which can only make the already grave condition of the civil justice system even worse. On the other hand, if no such re-allocation is made, criminal cases will be stayed. There will be a public outcry at this. *New additional permanent judges* would have to be appointed, at great long term cost to governments.

**RECOMMENDATION:**

We therefore recommend that the Federal Government consider the making of "anticipatory appointments" as a method of increasing temporarily the judicial resources available, in order to create a pool of additional judges for attacking the backlog problems across the province.



## CHAPTER 13

### MANAGEMENT OF CASES

#### 13.1 CASEFLOW MANAGEMENT GENERALLY

##### INTRODUCTION

We stated in Chapter 1 that in our view the modern civil justice system should operate under the rubric of an overall caseload management system.

Caseload management is a case-processing mechanism which manages the time and events of a law suit as it passes through the justice system. It does so with a view to achieving the following objectives:

1. the earlier resolution of disputes, where that is possible;
2. the reduction, and eventual elimination, of delays and backlogs;
3. the allocation of judicial, quasi-judicial and administrative resources to cases in the most effective manner; and,
4. reduction of the cost of litigation.

In any well-designed case management program there exist two components:

1. the effort that must be expended to "prevent delays" (referred to as *delay prevention*)
2. and the effort that must be expended to reduce delay in the aggregate i.e., to decrease the number of cases in a "backlog" status (referred to as *delay reduction* or *backlog reduction*).<sup>46</sup>

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<sup>46</sup>Taken from *Justice in Ontario: A change of Pace - Evaluation of the Case Management Pilot Projects*, prepared by QUINDECA Corporation, October 1994, at pp. 31-33 [hereinafter "Quindeca Report"].

The notion of case management entails a significant shift in the cultural mind set that has characterized the processing of civil cases in our courts for generations.

In that tradition it has been the role of the lawyers, together with their clients, to decide if and when a lawsuit would proceed, and when various steps would be taken. They have done so within the framework of the Rules of Civil Procedure, and the time parameters laid out in those Rules. With few exceptions, however, the prevailing attitude in Ontario has always been that those time parameters are to be honoured more in the breach than in the observance.

There is a growing recognition that this mode of operation is no longer appropriate. It has ceased to work effectively in delivering civil justice to the public. Given the rising costs and unacceptable delays in litigation and the similarly escalating demands on the administration and the judiciary, it is apparent to us that we no longer have the resources as a society to permit this *laissez-faire* approach to the processing of cases to continue.

Caseflow management involves the transfer of principle responsibility for management of the pace of litigation to the judiciary. *It also involves the establishment of reasonable, but firm, time limits and the adherence to those parameters.* In short, caseflow management entails a more active form of management and intervention by the court in the various phases of litigation. It does so with a view to promoting the earlier resolution of cases, to eliminating unacceptable delays, and, ultimately, to reducing costs and enhancing the quality of justice.

Ideally, this intervention occurs early and also with some frequency during the life of the case. We have heard constantly from lawyers, administrators, judges and members of the public that *early intervention by the judiciary is of critical importance* in the disposition of cases. This is true in all cases, but is particularly true in family law cases. It is often, and in our view accurately, said that the more times one can

build into the system an occasion when counsel has to pick up his or her file and think about it, the more likely it is that there will be an earlier resolution of the case.

We think this emphasis is important.

Studies show that approximately 55% of cases commenced never proceed to the point where a statement of defence is filed.<sup>47</sup> They are either resolved by way of a default judgment, settled outside of the courts before reaching that stage, or any interest in pursuing them simply dissipates. The remaining 45% of the case load proceeds through various additional stages of litigation, with the vast majority settling at some point between the pleading stage and the eve or morning of trial.

The reality is that 95% to 97% of all civil cases are never tried. They are settled. This seems to be the experience in Anglo-Canadian-American court systems wherever located and regardless of the structure which is in place to process the flow of cases through the system.

If this is the reality, then, it makes sense that the overall mechanism for the disposition of disputes should focus on dealing with the vast majority of cases that settle, *as well as* focusing on those that have to be tried. Historically in Ontario, however, the primary focus has been on the processing of cases in preparation for trial.

Caseflow management permits the necessary broadening of perspective and emphasis from this primary focus to a duality of focus -- disposition where possible, and trial where necessary. It does so by building in the potential for early -- and if appropriate, repeated -- judicial or quasi-judicial intervention. This is accomplished by means of case conferences which are either prescribed at fixed points in the

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<sup>47</sup>*The Bottom Lines*, Court Reform Task Force, Ministry of the Attorney General, June 1990.

process by the rules, or called at the instance of the case management judge or counsel. The case conference can take the form of an early evaluation or screening exercise; it can be used as an occasion to discuss the diversion of the dispute into one or another of the ADR channels; it can take the form of a settlement conference; or, if the case cannot be settled and is bound for trial, the case conference can take the form of a trial management conference. These events each provide occasions where the file must be dealt with by counsel. Moreover, they provide opportunities where the judge or the judicial support officer can work out with counsel how the case is to proceed.

Caseflow management is a concept which in our opinion offers great potential for combining and co-ordinating the various disparate elements of the civil justice system and integrating them into a more effective whole. It is able to do this by facilitating a combination of the following features:

- a) overall management of the case flow process by the judiciary;
- b) early intervention in a case either by a judge or by a quasi-judicial officer;
- c) the disposition of all interlocutory matters;
- d) the deployment of ADR mechanisms and techniques;
- e) the utilization of case conferences, settlement conferences and trial management conferences;
- f) the utilization of registrars, case management officers and judicial support officers to perform the administrative and quasi-judicial tasks which do not require a "section 96" judge to perform, thus freeing up judges to concentrate their efforts on the truly "judicial" activities of trying cases and assisting the parties in settling their disputes.<sup>48</sup>

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<sup>48</sup>i.e., a judge appointed by the federal government under section 96 of the *Constitution Act, 1982*, R.S.C. 1985. Judges of the Ontario Court of Justice (General Division) are "section 96" judges.

This approach to the disposition of civil disputes in the system calls for changes in attitude and practice on the part of those making the system work. Lawyers are required to adjust to the loss of control over the pace of their litigation and to utilize the ADR options which are available to address the resolution of their clients' problems. Judges are called upon to add to their classic adjudicative and settlement functions the roles of case manager and process facilitator. Administrators need to adapt to new methods of dealing with cases.

### **THE PILOT PROJECTS: BENEFITS AND LESSONS TO BE LEARNED**

In 1988 the Joint Committee on Court Reform called for implementation of a system of caseflow management in order to address problems of delay in the court system. Pilot projects were established in three cities -- Sault Ste Marie, Windsor and Toronto -- chosen to represent small, medium and large urban centres in Ontario. Control sites and mechanisms were put in place for comparative purposes.

In Toronto there are two pilot projects: civil and family. The family project encompasses both the General Division at 145 Queen St. and the Provincial Division at 311 Jarvis St.

- **Benefits**

The results of these projects demonstrate that case management works, when properly planned for, supported and resourced. In general, case managed cases are disposed of in the system at approximately twice the rate of non-case managed cases.<sup>49</sup>

In Toronto, for instance, 88% of the case managed cases initiated in the first 6 months of the project (December 1, 1991 to May 1, 1992) were disposed of as at

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<sup>49</sup>Report of the Joint Committee on Court Reform to the Civil Justice Review on Case Management, May 1994, *supra*, note 14 at pp. 8-12; see also, The QUINDECA Report, *supra*, note 47, pp. 10-15.



April 24, 1994, compared to only 41% of the non-case managed cases initiated during the same period.<sup>50</sup> In terms of pending inventory, 70% of standard track cases in case management are disposed of within 12 months of filing; 80% are disposed of within 18 months; and 90% within 24 months. For non-case managed cases the comparable figures are 20% disposed of within 12 months of filing, 30% within 18 months, and 35% within 24 months.<sup>51</sup>

In Sault Ste. Marie, where case management was first introduced, more case managed cases were resolved in a fixed period than non-case managed cases, and the case managed cases were resolved more quickly.<sup>52</sup> The Algoma Bar, initially very skeptical about the concept, has become strongly supportive of case management as it is practised there under the judicial leadership of Justices Pardu and Whalen. The Bar see case management as providing counsel with greater encouragement to look at their files for purposes of settlement, noting that if responsible counsel are constrained to think about their files, cases will be resolved. They acknowledged the utility of having time limits more closely enforced. Judges, lawyers and administrators called for a system that would free up judges earlier to do case conferences and pre-trials, and that would provide a person to assist the judiciary in carrying out its organizational and administrative tasks.

In Windsor, while the percentage of case managed cases resolved was lower, the case managed cases were resolved substantially more quickly (average of 208 days, compared to 393 days).<sup>53</sup> The Windsor project began on rocky footing, primarily because it incorporated all of its cases into the system, including the then

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<sup>50</sup>*supra*, note 10, at pp 10-11.

<sup>51</sup>The QUINDECA Report, *supra*, note 47, pp.10-11.

<sup>52</sup>*supra*, note 10, at pp. 10-11.

<sup>53</sup>*ibid*, pp. 10-11.



existing backlog. The Bar complained about getting their cases ready but not being able to process them because of insufficient judicial resources to provide pre-trials and trials. Matters have improved significantly, however. Windsor is an impressive success story in terms of delay and backlog reduction.<sup>54</sup> Under the judicial leadership of Justices Morin and Brockenshire, and with the hard work of court administrators and members of the Bar, the number of pre-merger cases waiting to be tried at the time of writing of this Report, has been reduced to 444 from 1822, and the number of post-merger cases has been reduced steadily.

In the United States there is more than ample evidence to demonstrate that case management works. A 1987 study conducted by the National Centre for State Courts of 26 cities over a period of 12 years concluded that courts which employed case management in a committed fashion significantly reduced delay.<sup>55</sup> A 1993 study undertaken by the Ministry of the Attorney General regarding the three Ontario pilot projects formed similar views,<sup>56</sup> and determined:

- a) that case management has reduced the delay between most stages in proceedings and substantially reduced the overall passage of time from commencement to resolution;
- b) that less overall time spent on case managed files by the bar and the public resulted in lower overall costs; and,
- c) that the cost per file of administering case managed cases to resolution is significantly lower than that of administering non-case managed files;

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<sup>54</sup>The QUINDECA report, pp. 29-33.

<sup>55</sup>See submission of the Joint Committee on Court Reform to the Civil Justice Review.

<sup>56</sup>*Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice*, A Report to the Courts Administration Division, Ministry of the Attorney General, November 1993.

The authors of that Report concluded:<sup>57</sup>

Evaluation of the Pilot Projects has demonstrated that Case Management has reduced the time during which cases receive services from the court; the number of services received; and, in some jurisdictions, the number of very expensive services - trials - received. Not surprisingly, then our review of administrative costs on a *per* file basis .... underscores the potential for long-term savings following a reasonable period of adjustment. Over time, Case Management can reasonably be expected to result in a net decrease in administrative operating costs.

A year later, in 1994, the Joint Committee on Court Reform engaged QUINDECA Corporation, through its principal, Jerry Short, to conduct an independent review of the three pilot projects. QUINDECA's Report<sup>58</sup> concluded that the case management experience in Ontario was sufficiently successful to warrant continuation. At p. 9, the authors state:

From a review of all three evaluation methods presented, and from a review of the numerous analyses performed during the pilot projects, the only conclusion is that the program is successful. Case management in the Ontario Court of Justice works. *Litigants, lawyers, staff, and judges are better off in terms of the time to resolve cases than those in non-case managed cases.* That is the conclusion and the measure of success. (italics added)

This conclusion is not presented by QUINDECA without caveats, however. We have incorporated some of these into the pre-conditions for a successful caseload management system which are put forward later in this Chapter.

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<sup>57</sup>*id.*, pp. 26-27.

<sup>58</sup>QUINDECA Report, *supra*, note 47.

- **Lessons from the Pilot Projects**

A number of lessons can be drawn from the pilot experiments.

- a) Need for Clear and Committed Leadership

There must be clear and committed leadership from the Bench, the Bar and the Administration. These qualities have not been absent from the pilots, although it must be noted that not all judges, lawyers and administrators share the same enthusiasm and commitment as that demonstrated by those who have chosen to take part.

The QUINDECA Report noted:<sup>59</sup>

At the same time, the biggest hurdles have come from within the ranks of the active participants: bench officers who do not support or enforce the case management rules; lawyers who abuse the system with repeated motions for extension of time; and administrative staff who delayed in providing an adequate infrastructure to support case management operations. These hurdles, however, were not and are not so formidable that they cannot be overcome. And, in fact many have already been resolved.

Indeed, it is our observation from talking to judges and lawyers around the province that those who have experienced case management are quickly persuaded of the advantages and benefits of the system, and become supportive of the concept. This is important because, as the Quindeca Report indicates:<sup>60</sup>

Perhaps, however, the single most important by-product of the case management system and the one that is not easily quantified are the numbers of *believers* in the case management program. Whether the numbers support the final conclusions or not, it is vital that the program's success be measured by whether the people who were hopefuls had actually become believers in the system. The mere presence of believers in the system (judges, lawyers,

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<sup>59</sup>The QUINDECA Report, *supra*, note 47, at p. 30.

<sup>60</sup>*id.*, Executive Summary, p. 8.

and staff) all point to a measure of success -- one which may not be quantifiable, but which has a far more significant affect on the program than ones that are quantifiable. It is especially encouraging that these believers comprise their number from people who have been involved in the program and people who have seen the practical results. (italics in original; underlining added)

b) Establishment of Standards and Criteria

It is important to establish basic standards and criteria so that the success or failure of the system can be assessed across the province on the basis of a common set of principles, and to entrench methods of measuring performance in terms of those standards and criteria. This means monitoring and managing the total case inventory from a system-wide perspective as well as on the basis of the rules and time standards that apply to individual steps in the process.

It also means setting standards regarding the speed with which a case should normally be processed through the system. This is important from the perspective of the public, which needs to know that there are measuring sticks for the processing of their disputes through the system. It is important, as well, for purposes of providing a yardstick against which what is a "true" backlog can be measured.

There are no empirical studies of which we are aware that establish time standards for the processing of cases. The American Bar Association has proposed the following standards, however:

- 90% of cases disposed of within 12 months of filing;
- 98% of cases disposed of within 18 months of filing; and,
- 100% of cases disposed of within 24 months of filing.

In the state of Michigan, the Wayne County Circuit Court -- which is roughly comparable in size to our Toronto Region -- has adopted these time standards. In the space of seven years they have reduced the number of cases in their system over 2 years in age from 17,141 to 327.

### **RECOMMENDATION:**

We recommend that Ontario adopt general time standards for the disposition of cases in the system from the date of filing. We propose the following minimum time lines for the completion of standard cases (recognizing that regional and local circumstances may suggest shorter parameters):

**From filing to settlement conference -- 9-12 MONTHS**

**From settlement conference to trial -- 9-12 MONTHS**

#### **c) Adherence to Time Standards**

Caseflow management will only work effectively if there is a firm, consistent policy for minimizing adjournments and adherence to time parameters, and if that policy is adhered to by the Bar and enforced consistently by the Bench.

#### **d) Case Management is not "Extra Duty"**

Judges cannot be expected to carry out their case management functions in addition to their regular judicial duties -- on a before and after hours basis, as it were. In the Toronto civil project, when case management was initially introduced, judges were asked to deal with their case management lists either early in the morning, in advance of their regular court sitting, or in the late afternoon and evenings, following those sittings. This was neither fair to the judges nor to the case management litigants and counsel; nor was it fair to the litigants or accused persons whose matters were being tried during the regular court hours.



Members of the judiciary across the province are willing to -- and do-- work hard throughout the entire working day and often well into the evening; but trying cases properly is a full time job, and adding the important function of case management to that load creates an impossible burden. The Toronto experiment in its beginning years proved this. Judges burned out, and other judges were discouraged, if not completely alienated, from becoming involved as a result of what they saw happening to those who were participating.

In the past year, however, changes have been made in response to the judges' concerns. A file is no longer assigned to an individual case management judge but is assigned to the "Case Management Team". Case management motions, conferences, and pretrials are now conducted as part of the regular working day. Changes in the Rules of Civil Procedure were introduced to enable registrars to handle some of the more routine scheduling matters. As a result, the team of 12 case management judges on the Toronto civil project, led by Justice Douglas Coe, have strongly recommended the implementation of 100% case management. In a Report to the Review, they concluded:

Case management is the way of the future. The judges in the Toronto Region, who have been involved in either the individual calendar system or in the team, support the expansion to 100% cases management for all civil cases in the Toronto Region, other than commercial, family and landlord and tenant. The team system has worked well. There need to be some adjustments to the Rules to expand the use of registrars to deal with all routine time extensions and to sign consent orders. As well, time needs to be allocated to allow judges to conduct follow up appointments during the regular sitting day for the small number of files that would benefit from follow up with one judge. A fixed, predictable trial date is a cornerstone of case management. Cases will not settle without a fixed date. There are not sufficient judges to hear the necessary trials, if judges are also expected to do motions presently being conducted by the masters. Additional judicial assistance is required to assist with routine contested motions. The restoration and expansion of the masters is the way to provide this much needed assistance. As well, significant improvements in the system could be achieved. Mandatory early conferences at the close of pleading and trial scheduling conferences, both conducted by



masters, would promote early settlement and would result in fewer, shorter trials. We urge the Task Force in the interests of the public to recommend the immediate restoration and expansion of the office of master to permit the expansion of case management.

It needs to be recognized that caseflow management should not be viewed as some separate and special approach to the processing of disputes through the civil justice system -- a "bell or whistle" that is nice to have but not essential to the operation. Caseflow management must become the ordinary way of carrying on the court's business.

As the Quindecia Report aptly summarizes it:<sup>61</sup>

Case management is not about single acts of Herculean effort -- though sometimes these are required to take a project over the hump or to reduce the backlog. Instead, case management is about institutionalizing a process and a support component that has as its first and second concern the fair, just, economic, and timely management of cases. It is simply a way of doing business.

Case management is not a pilot project. It is not a buzzword or fad. It is not a trick to transform judges from experienced, respected jurists into process managers. And, it most certainly is not a means to other ends. Case management is, in fact, an end unto itself. It is preservation of the most important roles and functions of the judiciary. It is insuring that the public's trust is protected. It is fulfilling the very reason that courts exist. To think of case management in other terms is to relinquish it to a lesser task.

To make case management the order of business for all, many things must be done.

Foremost is a clear articulation from the Bench, Bar, and Ministry leadership that case management is not a program or project, but it is the regular order of business. To this end, case management must cease being a separate set of rules or procedures - it must, instead, *be* the rules of court, the rules of civil procedure, the standards of judicial administration, or the terms of reference.

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<sup>61</sup>*supra*, note 47, pp. 14-15.

As long as the principles of case management are secondary to the daily routine of work, the efforts put toward case management will be extra-curricular, excessive, and burdensome. And, only a few will do it as they have been doing so far.

## THE REQUIREMENTS FOR EFFECTIVE CASEFLOW MANAGEMENT

The pilot projects in Ontario, then, have demonstrated that *case flow management works and that it is worth doing, provided that it is properly resourced*. Indeed, we believe that the civil justice system cannot function effectively or utilize its resources effectively, given the overly crowded calendars which are endemic to the current system, without the implementation of a caseload management system on a province-wide basis.

*It is important to emphasize again, however, that such a system must be supported by the proper infrastructure and resources. The implementation of caseload management must be accompanied by,*

- a) the support and commitment of the Bench, the Bar and the Ministry, to make it work;
- b) the necessary technological systems, including computer hardware, computer software and communication networks, and including the training and staff support which are essential to make such technology effective;
- c) the appropriate level and complement of staff support, including case management co-ordinators, scheduling staff, secretarial and file management staff;
- d) a willingness on the part of the judiciary to take responsibility for managing the pace of litigation and to enforce the time parameters set down;
- e) the appointment of judicial support officers to provide case management and judicial support;

- f) a strategy to reduce the existing backlogs at the same time as the new system prevents future backlog;
- g) the completion of an independent resource-needs analysis to determine the appropriate mix and quantities of the ingredients referred to above;
- h) the articulation of clear goals and standards -- both on a systems-wide basis and on the basis of monitoring the rules and time standards of individual cases -- in order to provide benchmarks against which the effectiveness of the system can be measured;
- i) the development of a detailed operational transition plan to phase in the introduction of case management on a province-wide scale over a reasonable period of time; and, finally,
- j) the creation of an ongoing, periodic review mechanism in order to ensure that the caseload management model continues to work as well as possible.

## **RECOMMENDATIONS:**

**We recommend that a caseload management system be implemented on a province-wide basis in Ontario over a period of the next 4-5 years. The system will manage the time and event of law suits as they pass through the civil justice system. With both delay prevention and delay reduction in mind, it should seek to achieve the following objectives:**

- 1. The earlier resolution of disputes, where that is possible;**
- 2. The prevention, reduction, and eventual elimination, of delays and backlogs;**
- 3. The allocation of judicial, quasi-judicial and administrative resources to cases in the most effective manner; and,**
- 4. Reduction of the cost of litigation.**

The exact nature and form of the system of caseload management to be introduced across the province is a matter to be left to an implementation team to be created for that purpose. However, in addition to the foregoing, the new model will need to include the following key features (some of which have been outlined earlier in this chapter and some of which are developed elsewhere in this report):

- Principle responsibility for management of the flow of cases by the judiciary
- Judicial and administrative teams, including judicial support officers and case management/administrative co-ordinators
- Screening and evaluation mechanisms to move cases into appropriate streams
- The processing of cases in accordance with given time parameters, which will be enforced
- Integration of the various dispute resolution techniques and case management mechanisms into a co-ordinated whole
- Case conferences (to deal with the logistics and processing of cases), settlement conferences (before which a case will not be listed for trial) and trial management conferences (before which a case will not be given a trial date)
- Training for staff, judiciary and the bar
- Adequate resources

We have earlier outlined certain factors which are considered by those with expertise in the field<sup>62</sup> to be pre-conditions to the establishment of a successful caseload management system. As it is critical that these factors be recognized for their import as prerequisites which must be adhered to, we repeat them here, as part of our recommendations.

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<sup>62</sup>id., pp. 15-25.

**THE IMPLEMENTATION OF CASEFLOW MANAGEMENT MUST BE ACCOMPANIED BY:**

- a) the support and commitment of the bench, the bar and the ministry, to make it work;
- b) the necessary technological systems, including computer hardware, computer software and communication networks, and include the training and staff support which are essential to make such technology effective;
- c) the appropriate level and complement of staff support, including case management co-ordinators, scheduling staff, secretarial and file management staff;
- d) a willingness on the part of the judiciary to take responsibility for managing the pace of litigation and to enforce the time parameters set down;
- e) the appointment of judicial support officers to provide case management and judicial support;
- f) a strategy to reduce the existing backlogs at the same time as the new system prevents future backlog;
- g) the completion of an independent resource-needs analysis to determine the appropriate mix and quantities of the ingredients referred to above;
- h) the articulation of clear goals and standards -- both on a systems wide basis and on the basis of monitoring the rules and time standards of individual cases -- in order to provide benchmarks against which the effectiveness of the system can be measured;
- i) the development of a detailed operational transition plan to phase in the introduction of case management on a province-wide scale; and, finally,
- j) the creation of an ongoing, periodic review mechanism in order to ensure that the caseload management model is working as well as possible on a continuing basis.

We conclude this section with a note about cost. Casflow management is resource intensive, to be sure. However, there are many cost saving measures that can be taken in conjunction with its implementation. Indeed, the QUINDECA examination concluded that additional funding may not be necessary for the implementation of casflow management itself. QUINDECA reported:<sup>63</sup>

Lastly, it would be simplest to identify and recommend satisfaction of these preconditions without regard to cost. The costs of the program and the ability to fund the program provide the context in which satisfaction of these preconditions must be viewed. To view them, however, in isolation of other programs would be to suggest they can only be resolved if *new money* can be found. This is not the evaluation team's conclusion. In fact, for every precondition that has a fiscal impact, the evaluation team has identified an offsetting cost reduction or new revenue source that could be considered to defray or completely offset the cost of the program. Reallocating existing resources, changing operational priorities, and re-thinking the premises for some existing costs all contribute to the pool of available funds to satisfy these preconditions.

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<sup>63</sup>*supra*, note 47, at p. 16.



## **CHAPTER 13.2**

### **THE TEAM CONCEPT: CASE MANAGEMENT TEAMS AND JUDICIAL TEAMS**

The central organizational concept for the implementation of caseload management, from the perspective of processing the cases, is that of the "case management team", which in turn contemplates the formation and utilization of "judicial teams".

In the caseload management system that we envision, judges, judicial support officers and case management co-ordinators will work closely together in teams to provide a more effective, cost-efficient and streamlined system. The result will be civil justice which is of better quality, which is more affordable and, which is, thus, more accessible to the public.

How will these "teams", as we envision them, be structured, and how will they work?

#### **The Judicial Team**

First, we propose that judges in the General Division across the Province be assigned to teams. This concept has been modeled with considerable success.

We propose that cases be assigned randomly, upon filing, to a team of judges. Each team will have a team leader. The team will be responsible for the disposition of the case load allocated to it, and it will determine how that work will be processed. It will do so under the guidance of the team leader, who will work in conjunction with the Regional Senior Justice in this regard. In this way, the members of the team will share responsibility and accountability for the management of the team's "inventory of cases", dividing up the management duties, the motion work, the pre-trials and the trials.

The judicial team concept is not something which need be confined to the large, single-location Region, urban centre of Toronto. Most major centres in Ontario have a sufficient number of judges assigned to them to comprise a team. Where that is not so, the judicial team -- and the case management team of which it is a part -- can be married with the concept of the "mini-circuit" which has sprung up within various Regions; and married, we hope, in a way that will reduce the amount of travel necessary for judges in such situations to meet the needs of their "team".

### **The Case Management Team**

While the judicial teams will bear overall responsibility for the processing of cases in the caseflow management system, they will form part of a broader "case management team" in performing these functions. The case management team will consist of judges, judicial support officers, and case management co-ordinators.

The terms "judicial support officer" and "case management co-ordinator" need explanation. They are new concepts, although each has a heritage in the existing system. Both are important to the smooth and effective operation of the civil justice system that we are proposing.

### **The Judicial Support Officer**

While the position of judicial support officer has as part of its heritage the traditional office of Master in the Ontario system, it is a newly formulated position designed to perform a role more in keeping with the integrated system which the Civil Justice Review is recommending.

There is a wide range of activities between the administrative and ministerial functions performed by registrars and administrators, on the one hand, and the functions performed by judges, on the other hand. These functions can be performed more expeditiously and in a more cost-effective manner by non-administrators and

non-judges. They are functions that do not require a judge appointed under section 96 of the *Constitution Act, 1982* for their performance, but they do require legal training, some case management and ADR skills, and the ability to exercise an independent discretion and to make independent decisions of a quasi-judicial nature.

The judicial support officer will perform these tasks, working in conjunction with the judiciary and the case management co-ordinators, as part of the case management team.

The tasks which they will perform will include,

- a) the early evaluation of cases for streaming into appropriate dispute resolution channels -- an ADR channel, involving mediation, mini-trial, arbitration or one or another of the many ADR options that are available; or a trial channel, if the case is one of those cases clearly destined for that route; or some combination of these two channels;
- b) the conduct of ADR sessions;
- c) presiding over case scheduling conferences;
- d) in the appropriate case, and in co-operation with the judiciary, presiding over trial management conferences;
- e) in the appropriate case, and in co-operation with the judiciary, presiding at settlement conferences;
- f) presiding over the types of interlocutory motions historically dealt with by Masters (experience in the case management pilot projects has shown that there are fewer such motions in a case managed system);
- g) acting on references, as Masters have traditionally done;
- h) acting as managers and triers of construction lien actions, in respect of which the Masters have developed a justly respected expertise; and, generally,

- i) performing the kinds of quasi-judicial tasks described above which do not require a judge for their performance but which nonetheless call for the exercise of the kind of independent discretion and decision making that are not ministerial or administrative in nature.

In family law matters, judicial support officers will not deal with pre-trial matters pertaining to interim custody, access or support.

While it is not contemplated that a separate "court-like" structure will be established for the judicial support officer, the judicial support officer should not be a civil servant (as that term is generally understood) and the office must be such as to carry with it the necessary stature and respect to enable the holder of the position to operate in an independent fashion and to make decisions that are accepted by those who are subject to them. Working closely with the judiciary, as part of the case management team, will assist in this regard. The judicial support officer's remuneration will need to be consistent with such a position. In addition, the position requires a legally trained person and, we propose, one who has practised law for at least 10 years. He or she will also require training and experience in acting as a provider of ADR services.

To ensure the requisite degree of stability and stature for the position, we recommend that the appointment be for life (with compulsory retirement at age 65) or at least for a lengthy period of time.

### **The Case Management Co-ordinator**

The third integral part of the case management team is the case management co-ordinator. Case management co-ordinators will work with the judges and the judicial support officers in carrying out the administrative, ministerial and scheduling aspects of processing the team's workload.

The case management co-ordinator will be an administrator. He or she will perform for the team the types of functions presently being performed by trial co-ordinators and registrars. These functions will include,

- a) scheduling of trials, motions, and case conferences (including settlement conferences and trial management conferences);
- b) where appropriate, and where the technology is available, scheduling and arranging telephone and video conference calls;
- c) scheduling ADR events;
- d) co-ordinating other events with parties or counsel;
- e) dealing with unopposed matters under the supervision of a judge;
- f) monitoring and co-ordinating the use of facilities and technology, and collection of data;
- g) monitoring and co-ordinating the collection of data for purposes of analysis and management of the team's work;
- h) ensuring that proper records are kept of matters relating to the team's caseload.

### **Research Facilities**

Law clerks and research facilities should be available to the case management teams, either as a part of the teams themselves or, at least, on a basis that assures ready accessibility to the members of the team.

### **The Rationale for This Approach**

The case management teams, then, will provide well organized and closely knit units of judges, judicial support officers and case management personnel, each responsible and accountable for the disposition of the inventory of cases assigned to the team. These management units will streamline and expedite the way in which cases are processed. They will facilitate the better allocation of judicial and other

resources in the system by enabling many functions that are presently being performed by judges in the case management pilot projects to be performed by less expensive personnel. They will facilitate better justice, with better managed motions and interlocutory proceedings, better co-ordination between Bench and Bar and Administration, and ultimately a better system that is less expensive to litigants and government.

An important feature of the case management team concept is its flexibility. The size of the team, and the number of judges assigned to work with a judicial support officer and a case management co-ordinator will vary to fit the practical needs and demands of the individual Regions and court centres in question. In this way differences brought about by geography, population, size of the Region or centre, matters of specialization and other factors of this sort can be accommodated.

This scheme will fulfill a number of "needs" in the system:

1. There is a need to allocate judicial and non-judicial resources in the most strategic fashion;
2. There is a need to integrate ADR effectively into the overall dispute resolution process;
3. There is a need to implement an early evaluation process to stream cases into the most appropriate dispute resolution channel for their most appropriate disposition;
4. There is a need to deal with the flood of motion and interlocutory work that is drowning the system;
5. There is a need to preserve the "reference" and "construction lien" functions presently being performed by a dwindling number of Masters;
6. There is a need to restructure the way in which human resources are deployed in the system.



Judges are the scarcest and most expensive human resource in the system. It is important to prioritize the allocation of their time and efforts so that they may concentrate upon those functions that judges are appointed to perform in society.

The role of an independent judiciary in society is to determine peoples' rights, when those rights need to be determined; to protect people from the arbitrary action of government, when that protection is needed; to decide between people and resolve their disputes for them when they are unable to accomplish that feat themselves or through the assistance of ADR mechanisms; and, to be involved at the stage of the proceedings where there is some reasonable likelihood that the parties may be assisted in arriving at a settlement. In this latter respect, judges may make a useful contribution by encouraging resort to ADR techniques in appropriate cases, and even by performing ADR services themselves. Finally, in addition to these functions, case flow management will add an overall responsibility for the management of the case flow process.

The system should be structured in such a way as to facilitate the application of judicial resources in the foregoing fashion, rather than to hinder it. We believe that the case management team and judicial team concept will accomplish this goal. It will do so by freeing the judiciary from the burden of quasi-judicial and administrative/ministerial tasks which are now occupying an ever-increasing portion of judicial time. These tasks will be performed by judicial support officers and case management co-ordinators.

The need for such a re-structuring is acute.

Motions, for instance, have increased across the province, since merger in 1990, by more than 100% in general matters and by more than 150% in family law

matters.<sup>63</sup> They are becoming lengthier and more complex. Indeed, motions are identified as the largest consumer of costs in the system, it being estimated that the Ministry of the Attorney General spends almost \$3,000,000 per year on the administration of motions.<sup>64</sup> What's more, most motions are dealt with in courtrooms that are critically needed for the hearing of trials, thus adding to administrative costs and to trial backlogs.

In the end, though, motions are a major drain on the system because they engulf a great deal of judicial time, thus diminishing the amount of time judges have to apply to trials by an equivalent amount. While the number of motions *that might otherwise be filed* will diminish in a case managed system, it seems unlikely that the number of motions which have to be dealt with will decrease in absolute terms. Hence the need to find a less expensive and more effective means of dealing with them, in the form of the judicial support officer.

We repeat, though, that while the judicial support officer will deal with the motion workload at one time dealt with by Masters, he or she will perform a much broader role as well -- the discharge of early evaluation functions, ADR functions and case management functions. The judicial support officer will occupy a position which is more flexible and more fitted to the integrated civil justice system which the Review is proposing.

There will be costs incurred in connection with the implementation of this proposal. We are confident, however, that those costs can be recouped by other proposals for the re-allocation of resources which we are recommending.

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<sup>63</sup>infra, Chapter 13.3

<sup>64</sup>Based on Ministry of the Attorney General Workload Indicators and Budget Allocation Process, Program Development Branch

In the first place, the taxpayer is saved the added costs of either having a more expensive section 96 judge performing functions which a less expensive judicial support officer can perform equally well, and perhaps better. More importantly, the taxpayer is saved the cost of the added strains and inefficiencies in the system which spring inevitably from the unavailability of a section 96 judge to perform the judicial functions attending that office, and thus in having the functions go unperformed or at least inadequately performed.

Secondly, as we have already observed, caseload management itself will reduce the number of motions which the Court would otherwise have to deal with through the elimination of most unnecessary motions. Moreover, implementation of the Simplified Rules proposal, endorsed elsewhere in this Report,<sup>65</sup> will have the effect of removing the plethora of discovery related motions in cases involving claims for money or property of a value under \$40,000. These in themselves will lead directly to cost savings. As we pointed out earlier, it costs government approximately \$3,000,000 per year to deal with motion work across the province. Thus, any significant reduction in the number of motions which the Court will be called upon to handle will lead directly to comparably significant savings.

In addition, under the case management team rubric that we have put forward, most motions will no longer be dealt with in courtrooms. Instead, they will be disposed of in motion hearing rooms or offices, thus releasing courtrooms for desperately needed trial use.

Finally, the integration of case management co-ordinators into the case management system will lead to cost efficiencies on the administrative side of the teams' activities. Streamlining of the inherently time-consuming scheduling exercise

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<sup>65</sup>see Chapter 14

respecting trials, motions, pre-trials etc. can only result in savings -- financially and psychologically!

In the end, we strongly believe the casflow management system, with its teams of judges, judicial support officers and case management co-ordinators, will provide a less costly, more streamlined and more effective system of justice.

## CHAPTER 13.3

### CIRCUITING

In the context of a caseload managed system, the questions of circuiting and judicial scheduling take on a new dimension. If the notion is "one case, one judge", or "one case, one team of judges", then matters must be scheduled and judicial assignments arranged in a manner that supports this approach.

This raises, directly, the issue of how an overall system of caseload management can function in a regionalized, geographically dispersed, 208 judge superior trial court which circuits and which operates traditionally on the basis of a master calendar. It is a difficult issue.

#### **Circuiting**

Circuiting has been a hallmark of the superior court in Anglo-Canadian jurisprudence since the time of the Normans in the eleventh century. In Ontario, circuiting can be traced back to the first act of the new government of Upper Canada in 1792, which introduced the English common law as the applicable law in civil and criminal matters in the province.<sup>67</sup>

Prior to the change in the structure of the courts in October 1990, the superior trial court was the High Court of Justice, a division of the Supreme Court of Ontario. It consisted of 55 judges who were based in Toronto (although appointed on a basis intended to be representative of the province), but who circuted to each county and district centre twice yearly. The District Court was the "resident" court in those communities, although its members also sat from time to time in other District Court centres within their regions and around the province.<sup>68</sup>

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<sup>67</sup>Zuber Report, *supra* note 2, pp. 11-12

<sup>68</sup>Reply of the Ontario District Court Judges Association to the Report of the Ontario Courts Inquiry, p. 13.

Since 1990, circuiting has continued in the General Division, but it is a circuiting of a different nature than that which characterized the former system, and it is a circuiting which has been met with far less enthusiasm by the judiciary. Moreover, it is a type of circuiting which leads to various inefficiencies and which has had an affect upon the morale of the judiciary.

These difficulties need to be addressed, in our opinion, and the whole question of circuiting approached with a view to adapting its strengths to modern day realities and to integrating those strengths into the overall rubric of caseload management which we are recommending for the Province.

### **Advantages to Circuiting**

Circuiting is an integral characteristic of the superior trial court. It brings the following qualities to the deliberations of the court:

1. First, and most importantly, it provides for consistency in the administration of justice in Ontario by,
  - a) encouraging a uniformity in application of the law across the province; and,
  - b) avoiding "balkanization" of the province into different pockets of law-applying segments.

Without circuiting, separated legal communities have the potential to develop their own brand of justice. A circuiting judge helps to ensure that decisions are rendered which are consistent with those being delivered elsewhere in the province.



2. Secondly, circuiting brings a "fresh face" quality to the administration of justice across the province.

The potential for an insulated Bench and Bar to develop an unhealthy familiarity amongst themselves not only enhances the prospect of balkanized justice, it creates the risk of weakening the aura and reality of impartiality on the part of the judiciary, which is the bedrock upon which our justice system rests.

A circuiting judge brings a new face to judicial deliberations in the community, one that is not caught up in local perceptions or familiarities.

3. Thirdly, and conversely, the circuiting judges themselves are provided with a new and differing perspective, not only on the legal environment in which they are accustomed to working but on differing parts of Ontario as well. Exposure to new places and faces is important. It is not healthy for the individual judge, or good for the public, for a judge to spend an entire career in any one place -- whether that place be at the corner of Queen St. and University Ave. in the City of Toronto, or in Thunder Bay, or Timmins, or Windsor, or Brockville, or Barrie, or anywhere else in Ontario. Variety benefits all.

Historically, circuiting has served to maintain a sense of strength and vitality amongst those who engage in it. Requiring judges to deal with a wide variety of civil and criminal matters in a wide variety of locations across the province infused them with a renewed robustness and vigour. It also contributed to the development of a collegiality and cohesion amongst the members of the circuiting court. Overall, the quality of justice was enhanced by the process.

### **Circuiting Since 1990**

Since 1990, circuiting has continued to take place in the General Division. Today, however, "circuiting" has come to represent, with few exceptions, the travelling of judges within the newly created Regions of Ontario. Moreover, within the Regions themselves circuiting is frequently confined to "mini-circuits" along one particular route or another, or in a particular area.

In our view, these developments have diluted the advantages and purposes of circuiting in a superior trial court.

Judges in the Ontario Court of Justice (General Division) are expected to circuit within their Regions, unless they cannot do so for reasons of health. Toronto is an exception, since it is one city comprising an entire Region. There, judges do not circuit; however, because of the concentrated volume, they move around by subject matter in 6 month rotations. This latter phenomenon can create similar difficulties to that of geographical circuiting, in terms of the scheduling of cases and assignment and availability of judges -- both of which are factors that have to be taken into account in developing a viable caseload management system.

It is the opinion of this Review that circuiting, as presently constituted, can be improved.

The convention of circuiting only within the Regions, and frequently only within limited areas within Regions, increases the potential for balkanization of the justice system in Ontario. While this practice may maintain a consistency and uniformity in the administration of justice within the Regions -- or, at least, within the mini-circuits inside of those Regions -- it may well have the opposite effect for the province, as Regions and mini-regions become more and more identified as jurisdictional units in themselves. Furthermore, with judges circuiting around Regions instead of around the province, the "fresh face" too readily becomes a "familiar" face

and the values of differing perspectives and experience are lost.

In addition, circuiting as presently constituted has created the perception, if not the reality, that circuiting assignments are not evenly allocated around the province and that circuiting is taking place simply for the sake of circuiting. In the words of some, circuiting has become "merely a deployment of resources" or "merely an exchange of judges", without regard to the important underlying values which give it its worth. Not infrequently, a judge will travel from community A to community B, while another judge at the same time is travelling from community B to community A.

In Toronto, some judges are concerned that changing assignments by subject-matter is forcing the Court in that Region into an unwarranted trend towards specialization. While there are advantages to judges being available, and able, to spend large portions of their time presiding in matters regarding which they have a particular expertise and interest, it remains the case that judges appointed to the Ontario Court of Justice (General Division) are judges of the superior trial court of general jurisdiction in all civil and criminal matters. It is important that judges continue to have exposure to all areas of the law in order to maintain the essential character of the Court and to provide the judiciary with the "battery-recharging" lift and robustness that dealing with a variety of matters permits. When the pressure of volume and scheduling leads to judges being allocated more or less permanently to their areas of "expertise" because they can more "efficiently" -- that is to say, more quickly -- process the workload, these values are eroded in the long run.

There are some inefficiencies in any system of circuiting. Since most judges now travel between communities, unless health prohibits, there are, in fact, *more* judges circuiting today than was the case in the past. Judges who are constantly away from their "home base" however, cannot work as effectively in the long term as those who are not. We were told by judges and lawyers that there is often a loss of

productive time during the last 2 or 3 days of any circuiting rotation because the judge is unable to embark upon a case that might extend beyond the end of his or her "sittings" in that community. Judges travel on their own time. The fact that they are away from home impacts negatively on judicial morale.

### **A Re-Assessment**

The primary difficulties associated with present day circuiting are its focus on restricted geographical areas, the frequency with which judges must travel within those limited areas, and the strain and inefficiencies arising out of such frequent travel.

These difficulties can be addressed, in our view, by making changes to the manner of circuiting which will re-inject into the system the values outlined above which were embodied in the traditional form of circuiting. Those values -- consistency and uniformity in the application of the law across the Province, the judicial "fresh face", and the maintenance of a diverse and vigorous Bench -- are paramount, in our view, and must be maintained in order to ensure the highest quality of justice throughout Ontario. The inefficiencies of circuiting can be dealt with through the implementation of circuiting conventions and exchange protocols. Amongst other things, such conventions and protocols can ensure that there are judges "to cover" for held over circuiting judges.

Circuiting should remain as a central characteristic of the superior trial court. It must be re-structured, though, to avoid the pitfalls we have discussed and to enhance the strengths that it brings to the Court.

### **The Form of the "New" Circuiting**

In conjunction with our concept of teams of judges around the province operating under the umbrella of an overall caseflow management system, we recommend that circuiting be re-organized along the following lines:

- a) Judges in all Regions will be assigned to teams.

This idea has already been employed successfully. As we have previously explained each team will be allocated an inventory of cases to deal with, from their inception into the system, and will be given the responsibility of processing those cases to conclusion. To enable it to carry out its mandate, each team will be provided with a support structure comprised of the necessary staff (including access to judicial support officers and case management co-ordinators), facilities and technological capabilities which will allow the team to do so.

The team, under the direction of its team leader, and in conjunction with the Regional Senior Justice, will decide how it will deal with its case load -- who will hear motions, conduct pre-trial conferences, engage in ADR processes and hear trials; when; and where.

- b) We anticipate that the "team" concept and the present concept of the "mini-circuit" can be effectively combined. Travel will be for the purpose of effecting the team's work, as organised by the team in conjunction with the Regional Senior Justice. This sort of travel will be necessary to even the workload and to equalize the resources, particularly in the smaller court centres, but it should reduce the amount of travelling, the amount of downtime and inconvenience that presently exists.

- c) The primary focus of circuiting, however, would be on *circuiting between Regions*.

Inter-regional circuiting would require circuiting among all eight regions by judges from all eight regions. Such a process would ensure that circuiting is divided equitably among all judges of the General Division, thus reducing excessive circuiting time for individual judges and reducing the impact of geography.



The amount of time that judges will be required to circuit is a matter to be determined by the Chief Justice. There may be some exceptions, we would anticipate, for those whose health precludes such travel or who, for other legitimate reasons, are unable to participate.

The circuiting judge would be fitted into the team concept. Incoming circuit judges will exchange with outgoing circuit judges. We think it preferable, however, that the incoming judge be assigned to preside at trials as much as possible. In this fashion, the values which circuiting is designed to foster are best preserved and enhanced.

Inter-regional circuiting is, in our view, the most effective way in which to ensure that uniformity and consistency, the notion of a "fresh face" to justice with its attendant implications, and the promotion of a continually re-invigorated judiciary -  
 - all important values which circuiting has historically brought to the justice system -  
 - are protected. When judges truly travel around the province, rather than simply around a Region or parts of a Region or across the street, these concepts continue to be nurtured and strengthened, and circuiting ceases to be merely "an exchange of judges" or "circuiting simply for circuiting's sake". The public benefits from this.

d) In an attempt to minimize the inefficient down time which sometimes attends the end of a judge's circuiting rotation, we believe consideration should be given to a proposal put forward by the members of the Advocates' Society in Central East Region.<sup>69</sup> The proposal is to put into practice, in an effective way, the creation of a "short list" of matters which can be ready to proceed on quite short notice -- something which has been tried in Central East before. The concept has been tried in other locations, such as Kingston, as well.

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<sup>69</sup>*supra*, note 45, pp. 15-18



This "short list" concept depends upon the co-operation of the Bar, and the willingness of its members to respond quickly when "downtime" occurs as a result of a collapsed list or the inability of a circuit judge to begin a long matter. With the consent of counsel, civil cases which are *realistically* expected to take less than two days to try, and long motions, are placed on a list of cases ready to proceed on short notice. When trial co-ordinators get "the feel" that a regular sitting is likely to collapse, or that there is likely to be some "unused" time at the end of a sitting, they will notify counsel with cases on the short list to be alert and to advise whether or not they can be ready to proceed. Experienced trial co-ordinators do this now. In this way, it is hoped, cases will be found to fill in what may become unused downtime for the judge and the court.

#### **RECOMMENDATIONS:**

We recommend that circuiting be recognized as a central feature of the Ontario Court of Justice (General Division) and that judges of that court be required to circuit between regions, for a number of weeks per year to be determined by the Chief Justice. Judges should move into and out of the "Judicial Teams" to be established throughout the province. Circuiting within Regions should take place in the context of the team concept, as directed by the Chief Justice and the Regional Senior Justice.

## **CHAPTER 13.4**

### **CALENDARING**

How judges are assigned to cases depends upon the "calendaring" system which is in place in the jurisdiction.

#### **The Master Calendar**

In Ontario, the civil courts have traditionally operated on the basis of a "master" calendar.

Under this model, judges are assigned to hear trials or motions or to preside at pre-trials on particular dates. Cases from the pool of cases on the master calendar which have been designated to be heard on those dates are then brought before the judge to be dealt with (assuming there is a courtroom or hearing room available for the judge on the date in question -- or, conversely that there is a judge available for the courtroom or hearing room to which the matters have been assigned!).

One of the results of this method of assigning cases is that several judges and/or Masters may deal with the same case on several different occasions as it works its way through the system, a state of affairs which can lead to inconsistencies and a duplication of preparation time for counsel and "education" time for judges. On the other hand, the great strength of the master calendar system is that it permits flexibility in the assignment of judges to cases.

#### **The Individual Calendar**

In an individual calendar system judges are randomly assigned to cases when the file is opened. Most systems include some method of case identification that allows this random assignment to occur on the basis of the type of case involved so that each judge is assigned an equally balanced calendar. The assigned judge is

responsible for the assigned case until it is either disposed of (in the American system) or ready for trial (in the Canadian system).

While there are strong arguments for and against both systems, those jurisdictions that have achieved the most dramatic results with caseload management are those which have used an individual calendar system. There is an advantage to a single judge, who has thorough knowledge of the case, dealing with all matters until the case is tried or ready to be tried. Monitoring of scheduled events is more careful when there is individual responsibility for the file and frivolous, unnecessary or "simply strategic" motions are minimized.

Individual calendaring is difficult to achieve in Ontario, however, because judicial resources are spread out over approximately 50 General Division locations and a large geographical area. Judges in the Regions apart from Toronto are required to circuit to different court locations within their Regions. Individual calendars are problematic in such circumstances, because a judge may not be physically present in the same location for a significant period of time.

In Toronto, as we have noted, judges do not circuit geographically, but do move from subject matter to subject matter in six month rotations of criminal, general civil, family law or commercial list matters. Similar difficulties regarding individual calendaring are posed by such arrangements.

To some extent, the introduction of technology in the form of teleconferencing and video conferencing, together with the capability for the electronic transfer of files, will help to overcome some of these difficulties. Nonetheless, a system of individual calendaring, in its traditional form, does not appear to be readily adaptable to the civil justice system in the province as a whole.

In many, if not most, of the courts in the United States, on the other hand, judges work on the basis of an individual calendar in which cases are randomly assigned to them from beginning to end. This latter paradigm seems, at first glance at least, to be more consistent with a caseload management system which has as one of its clarion features the same notion that a case is "managed" by one judge from its inception to its disposition.

How, then, does one implement the recommendation that Ontario's civil justice system should operate under the rubric of caseload management in the context of an itinerant superior trial court which is regionalized and which currently functions on the basis of a master calendar system?

### **The Team Concept**

The most promising answer to the calendaring question, in our opinion, is the concept of judicial teams, which we have outlined earlier. The concept has been tried as we have noted, with considerable success, in both criminal and civil matters. We see no reason in principle why it cannot be applied across the province.

The team concept is central to the Review's vision of how the civil justice system in Ontario will look as we move into the 21st century. Teams will become the judicial and administrative units to make the rubric of caseload management function effectively. They will form the vehicles by which circuiting *within* the Region -- or "mini-circuiting" as it is more customarily becoming -- is accomplished. They will provide the judicial unit for absorbing and integrating judges who circuit *inter-regionally*, a notion which also forms a central part of the recommendations of this Review.

## CHAPTER 13.5

### THE MULTI-DOOR CONCEPT AND ALTERNATIVE DISPUTE RESOLUTION

#### The "Multi-Door" Concept

Earlier in this Report we have alluded to the "multi-door" concept of civil justice.

By that we meant a system where the "Court", in a very broad sense, becomes a "dispute resolution centre" -- a place where people go to have their differences resolved in a fashion which is most appropriate to their particular situation. That may -- and often will -- involve going through the traditional "courtroom door" for a court adjudicated resolution of their dispute. On the other hand, it may involve going through one or another of numerous "alternative dispute resolution" doors -- the mediation door, the early neutral evaluation door, the mini-trial door, or the arbitration door, for example.<sup>70</sup>

Central to the multi-door concept is the early evaluation and screening of cases with a view to directing them through the most appropriate "door". This is done through the application of various criteria designed to determine the dispute resolution mechanism most suited to the dispute. Such criteria include: the nature of the case; its complexity; the number of parties; the relationship of the parties; any

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<sup>70</sup>The idea of the multi-door courthouse was developed by professor Frank Sander, Bussey Professor of Law and Associate Dean, Harvard University. It has been experimented with in numerous American states, including projects at Cambridge, Massachusetts, Tulsa, Oklahoma, Houston, Texas and Washington D.C. See, F.E.A. Sander (1976) "Varieties of Dispute Processing", 70 F.R.D. 111; S.B. Goldberg, F.E.A. Sander and N.H. Rogers, *"Dispute Resolution"*, Little, Brown and Company, 1992, at pp. 432-433. F.E.A. Sander, (1985) "Alternative Methods of Dispute Resolution: An Overview," 37 U.Fla. Rev.1; F.E.A. Sander, "Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience", Cochrane ed., *Attorneys General and New Methods of Dispute Resolution* (1990), at pp. 19-23.



disparity in bargaining power; the history of the negotiations between the disputants; the nature of the relief sought; and the size of the claim.<sup>71</sup>

Members of the public should have the option to select the process which is most suitable to the resolution of their particular dispute, as well as the facilities to enable them to make that choice. Alternative dispute resolution -- or "ADR" as is commonly known -- offers an important panoply of techniques for achieving this goal, particularly in conjunction with the rubric of caseload management.

### **What is ADR and What does it Offer?**

ADR techniques are not a panacea for all that ails the civil justice system. They simply provide other methods of attacking the ever present need for human beings to settle their differences. They supplement the court system. They cannot - and should not be expected to - supplant it.

ADR offers a variety of techniques to assist disputants in arriving at resolutions which are more expeditious, less expensive, and, consequently, far less draining from an emotional and psychological point of view for the participants. The great advantage of these techniques is their flexibility -- their "smorgasbord" nature. The disputants are free to pick and choose the technique which best suits their dispute, and to do so on their own schedule, in a more informal manner, and under the shield of confidentiality, if they so desire. In short, they can "fit the forum to the fuss"<sup>72</sup>, tailor-making their own procedure and, ultimately, their own solution.

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<sup>71</sup>taken from a paper entitled "Alternative Dispute Resolution and Canadian Courts: A Time for Change", prepared for presentation at the Cornell Lectures, Cornell University, July 1994, by the Honourable Mr. Justice George Adams and Naomi L. Bussin, at p. 31 [hereinafter "Adam & Bussin"]; see, Sander, "Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience", *supra*, note 71 at pp. 19-21.

<sup>72</sup>A favourite expression of Professor Frank Sander, *supra*, note 71.



The benefits provided by ADR processes have been summarized as follows:<sup>73</sup>

- (a) lower court caseloads and related public expense;
- (b) more accessible forums to people with disputes;
- (c) reduced expenditures of time and money for parties;
- (d) speedy and informal settlement of disputes otherwise disruptive of the community or the lives of the parties and their families;
- (e) enhanced public satisfaction with the justice system;
- (f) tailored resolutions to the parties' needs;
- (g) increased satisfaction and compliance with resolutions in which the parties have directly participated; and
- (h) restoration of neighbourhood and community values and more cohesive communities.

The most commonly known forms of ADR include such techniques as mediation, arbitration, early neutral evaluation, neutral fact-finding, mini-trials and, of course, negotiation. Negotiation is the oldest form of dispute resolution, dating back as long as there have been two or more people on earth! It is also the best form of dispute resolution, because solutions are arrived at voluntarily rather than by imposition; because negotiation is empowering; because the parties control the process, and their own and everyone else's participation in it; and, finally, because the parties also create and control the final resolution of the issues.<sup>74</sup> However, it does

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<sup>73</sup>Adams & Bussin, *supra*, note 71 at p. 14; taken from Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers, *Dispute Resolution*, *supra*, note 71 at p. 8.

<sup>74</sup>See D. Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview", Emond ed., *Commercial Dispute Resolution: alternatives to Litigation* (1989), at p. 19.

not always work, by itself. When it does not, the parties require the assistance of a third party, either as facilitator or adjudicator.

A great deal has been written on the subject of alternative dispute resolution, and it is not the purpose of the Civil Justice Review to repeat that wealth of information. A brief description of the basic forms of ADR might be useful, however.

### **Early Neutral Evaluation**

Similar to the current process of pre-trials, early neutral evaluation requires the early assessment by an outside expert of the strengths of someone's case. This evaluation need not be by a judge but can be by a senior practitioner with particular expertise in the matter being litigated or by a trained ADR provider.

### **Pre-trials**

Pre-trials refer to meetings held between counsel and a judge (other than the one who will ultimately hear the case). Except in family law matters, it has not been common for parties to attend. Generally, counsel will file documentation outlining the facts of their case and the law and evidence that they will put forth at trial to support their position. The judge is asked to give an opinion as to how he or she would decide the case if they were the one making the decision. This allows the parties to reassess their positions before proceeding to trial. In a well-prepared for and well-run pre-trial, the judge and counsel will actively explore the possibilities of settlement.

### **Mini-trials**

A "mini-trial" is not a trial at all, but is a more structured presentation of the case than takes place at a pre-trial. It might be compared to a condensed version of the trial, with the presentation being made to a neutral person like a judge, or, preferably, to a neutral person plus a representative of each party. Evidence may be

presented in the form of oral testimony and/or in affidavit form. The procedural details are usually determined by the parties in advance.

In the course of preparing for the mini-trial, the parties are required to give a thorough examination of the merits of their case. Once again, they have the benefit of an opinion from an outside evaluator.

### **Mediation**

Mediation is a process in which a neutral person, agreeable to the disputing parties, acts as a facilitator to their negotiations and assists them in arriving at their own mutually acceptable solution. Mediation may occur before the litigation has commenced or at any time before trial. Generally, it is undertaken outside the court process, although judges will use mediating techniques in attempting to promote settlement discussions.

### **Settlement conferences**

In a case managed environment, there may be a number of meetings held in the course of the litigation between the parties and the assigned judge or team of judges. It is expected that at least once, before trial, there will be a meeting to actively explore the possibilities of settlement of all or part of the issues.

### **Arbitration (binding and non-binding)**

In this form of ADR, a neutral third party acts as an adjudicator. The parties can determine in advance if the decision of the arbitrator will be binding or non-binding. A non-binding decision will allow the party to proceed to the courts in the event that they are unhappy with the litigation and no reference will be made to the arbitrator's decision. In binding arbitration, the decision is enforceable. The parties

will generally determine in advance what right and procedure of appeal will apply. If they do not, the provisions of *The Arbitrations Act* apply.<sup>75</sup>

### **The Need for Standards for ADR Practitioners**

Currently there exist few, if any, standards for qualification as an ADR practitioner. There are no accreditation facilities of a provincial or federal nature. There are individuals and organizations which provide training and courses in ADR. While much of this training is excellent, we believe it to be in the public interest that standards of accreditation be established, in order to ensure a high level of quality in the services provided to the public, both through the private sector and through any court-connected facilities that may be provided.

### **Should ADR be Court-Connected?**

There are two factors which, in our view, support the conclusion that ADR facilities should be available to the public as part of the "court" system (again using the concept in a broad sense).

The first, as we have already mentioned, is that the state has an obligation to make available to its members the means by which their disputes may be resolved through the medium of objective, independent and fair third party intervention, when they are unable to resolve those disputes themselves. ADR is an effective way of doing so for many civil disputes, albeit not for all. Parties should have the option of resorting to the private sector for ADR services -- and, indeed, should be encouraged to exercise that option. There are many skilled ADR practitioners in the private sector. Civil justice ought not to be privatized, however, in the sense that the public is *required* to resort to private providers in order to enjoy the opportunities offered by ADR techniques. Such a circumstance could have the effect of limiting access to

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<sup>75</sup>*The Arbitrations Act* R.S.O. 1990, chap. A.24, as amended.

ADR options by those who are unable to resort to the private sector for one reason or another.

Secondly, ADR fits smoothly with the notion of caseload management. Many of the techniques of ADR are already used by judges in settlement conferences. The use of these techniques can be expanded to other types of case conferences and, generally, to the process of managing the case throughout. Indeed, it could be argued that ADR itself is a multi-faceted form of case management. Since one of the important goals of case management is the early resolution of cases, the Court should have access to the range of ADR techniques which are available to effect that purpose, particularly the mechanism of early screening and evaluation of cases. If these procedures are to be effective in resolving some matters, it is critical that the Court have access to the tools.

Mr. Justice George Adams expressed the rationale for court-connected ADR in the following passage, in a paper on ADR, presented at Cornell University in July, 1994:<sup>76</sup>

The inter-relationship between the courts, the rule of law and dispute resolution cannot be understated. Its importance to a viable democratic society has been underlined by the Supreme Court of Canada in the following passage from the decision of the Honourable Mr. Justice Cory in Edmonton Journal v. Alta. (A.G.):<sup>77</sup>

There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. ...

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<sup>76</sup>Adams & Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change", *supra*, note 71 at p. 3.

<sup>77</sup>[1989] 2 S.C.R. 1326 at 1337 (S.C.C.).



It is precisely this fundamental public function of the courts that makes court-annexed ADR so crucial. Our courts must reflect the growing complexity of Canadian society in the dispute resolution processes they offer to the public. We can no longer take efficient private self-ordering for granted. The law applying to efforts of the profession through settlement requires active support. It is not sufficient to provide only one specialized and formal dispute resolution procedure - the trial.

Whether one or another of the ADR options is an appropriate one for any case is a question that should be canvassed regularly during the course of the case's progress. Case management, with its more "hands on" judicial approach, and its more frequent resort to case conferences, is an ideal vehicle to permit the parties to do so, and to move their matter out of the litigation stream into ADR at any stage where it seems appropriate, either for the resolution of the dispute as a whole, or for the resolution of a particular issue or issues.

### **The Court-Connected ADR Centre: A Pilot Project**

A pilot project in court-connected ADR was launched in October, 1994. A joint project of the Ontario Court of Justice (General Division) and the Ministry of the Attorney General, it is the first court-connected ADR project in Canada.

One out of every 10 new civil cases commenced in Toronto Region is referred to the new ADR Centre, by random selection through the computer system supporting the case management project. The cases are selected at the point at which the first statement of defence is filed, excluding automobile negligence cases, family matters and applications.<sup>78</sup> Some matters are also referred to the Centre from the Commercial List in Toronto and in certain other cases, by members of the judiciary. Motor vehicle cases and family law matters are excluded, for purposes of the pilot project.

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<sup>78</sup>See generally, C.E. Hart, "Alternative Dispute Resolution", *The Advocates' Brief*, Vol. 6, No. 5, December 1994; see also *Practice Direction Concerning Alternative Dispute Resolution Pilot Project in the Ontario Court of Justice (General Division)*, (1994) 16 O.R. (3d) 481.



When a matter has been referred in this fashion, the ADR Centre sends the parties and counsel a notice to that effect and an appointment date for an ADR session. The notice of referral explains the procedure at the ADR Centre, the options available and what is expected of the parties.

Participation is not obligatory. However, it is obligatory that the parties "meet and confer" before attending or determining that they will not attend. They may settle the case at the meet and confer stage, of course. They may decide to utilize the services of a private ADR provider. They may decide to attend the ADR session. Or, they may decide to opt out. If the parties choose to opt out, however, they must file a certificate indicating that they have been advised by their counsel of the availability of the range of ADR processes and of the existence of the court-based ADR Centre *and* that ADR techniques have been considered but are unlikely to succeed. Without the filing of such a certificate, the action may not proceed to trial. In addition, even where the matter is not to be dealt with at the ADR Centre, after having been referred there, the parties must outline, in the same certificate, the legal and factual issues which are to be determined at trial and state the estimated length of trial.<sup>79</sup>

Where the parties have resorted to the private sector, but the process has not succeeded, the foregoing certificate must also be filed, before the matter can proceed to trial, stating the name of the private provider used and the ADR technique employed. The remaining legal and factual issues must also be summarized, and the time of trial estimated.

The ADR Centre illustrates other positive aspects of such a scheme as well, we believe. The certificate previously mentioned must also be submitted when the session or sessions at the Centre have not successfully resolved the case, and where

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<sup>79</sup>*id.*, Practice Direction, Form 4.

ADR has not been tried, or where it has been tried unsuccessfully in the private sector. The requirement that the factual and legal issues be articulated and defined early on will be of great assistance in focusing the efforts of counsel and the parties during the processing of the case. Those issues which remain for trial can be much more easily managed at trial.

Where the parties choose to attend the ADR session they meet, in a session of approximately 2-3 hours, with a dispute resolution officer ("DRO"). It is important to note that the parties are expected to attend with counsel. Initially the DRO meets with all parties and counsel together, and then separately as often as necessary. The session takes the form of a mediation, but an assessment is made during this process of whether other ADR processes -- such as neutral evaluation or a mini-trial -- may be more appropriate for the case. Arbitration, or other binding forms of dispute resolution are not provided.

Judges are also available to participate in ADR sessions at the Centre. The role of the DRO or judge varies with the nature of the case and the relationship of the parties, but includes, for example, the following:

- opening up lines of communication between the parties
- identifying and narrowing issues
- focussing on the underlying interests of each side
- identifying areas of disagreement as well as agreement
- conveying messages between the parties
- highlighting the consequences of not settling
- identifying options beyond the view of any one party, and
- working with the parties to develop potential elements of a settlement package.<sup>80</sup>

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<sup>80</sup>C.E. Hart, *supra*, note 79.

The design and results of the pilot project are being monitored and assessed, and the ADR Centre will be evaluated at the conclusion of its two year mandate. It is too early to draw any firm inferences from the experience at this stage. However, the early indications are generally promising. A significant number of actions are settling *before* the attendance at an ADR session. An encouraging number of those who attend for mediation settle. The parties seem pleased with the results and the process. There are still a large number of lawyers and parties who are opting not to participate in the process, though.

An ADR session provides the opportunity for early evaluation and screening.

### **Early Evaluation and Screening**

The early evaluation and screening of disputes coming into the system is important both from an administrative perspective and from the perspective of case management and the processing of those disputes.

"Evaluation" in this context does not refer to the consideration of the controversy on its merits, although it may lead to discussions along those lines. It refers to the notion of examining the dispute with a view to assigning it to the appropriate administrative and processing route. "Screening" refers to the exercise of making that assignment. In combination, these two techniques make a beneficial tool for the effective management and administration of cases in the system. Moreover, an evaluation and screening exercise involving the parties -- such as an ADR session at the ADR Centre -- creates another occasion where there is an early opportunity for settlement discussions. Some cases will settle simply as a result of that opportunity.

At an early evaluation and screening session -- an exercise which is ideal for the judicial support officer in the team concept we are advocating -- the parties will assess the various processing options that might be followed, having regard to such

factors as the nature of the case, the relationship between the parties, the amounts and issues involved and so forth. What, in other words, is the appropriate "door" to go through and how do they best "fit the forum to the fuss" ? Once these questions have been determined, plans can be made to move the action along that chosen path.

Apart from emergency matters, such as injunctions without notice, there is little need for any judicial intervention in cases that are not defended. Somewhere between 50% to 55% of proceedings commenced are never defended.<sup>81</sup> A certain number of these are never proceeded with, notwithstanding the default. They simply languish in the system, a drain on storage and other resources.

There should be some onus on the party who invokes the court process, and on that party's counsel, to see that a proceeding is pursued in a reasonably timely fashion, or disposed of if it is not to be pursued.

Where an action has been settled, as we have pointed out previously, Rule 48.12 imposes an obligation upon a party to notify the Registrar in the event of a settlement "whether it is placed on the trial list or not". This obligation applies even to those actions which, although undefended, are ultimately settled by the parties. Counsel should not lose sight of that obligation.

In both the Toronto and Windsor case management projects, there is provision in the case management Rules for the Registrar to dismiss an action in certain cases of default.<sup>82</sup> Where the plaintiff has not filed proof of service of the originating documents within the time required, the action will be dismissed in the absence of an order by a judge to the contrary. Under the Toronto Rules, where the defendant

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<sup>81</sup>The Bottom Lines, *supra*, note 48.

<sup>82</sup>Toronto Case Management Rules 2.06, 2.07 and 2.08; Essex Civil Case Management Rules 6.1, 7.1, 8.1 and 9.1.

fails to defend within the time required by the Rules, there is a further provision for dismissal of the action by the Registrar where the plaintiff does not take the necessary steps to dispose of the matter after being notified of the default. These provisions have the effect of finalizing the matter for court purposes and for purposes of the client and lawyer.

### **ADR and Lawyers**

Lawyers are "dispute resolvers" by training and profession. They are ideally suited to take advantage of ADR techniques for the benefit of their clients because of their skills as negotiators and as analysts of factual situations.

Professors Henry Hart and Albert Sacks, of Harvard Law School, aptly described these characteristics over 35 years ago, when they wrote:<sup>83</sup>

Closely related to [the] role as representative in forms of adjudication is the function as representative in the private settlement of disputes without litigation. This brings into play three distinct facets of [a lawyer's] training: skill in anticipating the probable outcome of litigation and so in estimating the bargaining strength of each side; skill in negotiation in finding the common ground of mutual advantage between the parties; and skill in the formal exercise of the legal powers which make settlement binding.

While there has been a certain inertia on the part of the legal profession in Canada in embracing the concept of ADR, acceptance appears to be growing. Many practitioners have become private ADR providers. Many are inserting "ADR dispute resolution clauses" in contracts they are negotiating on behalf of clients. Many are consciously directing their clients towards ADR as an effective means of dealing with their civil conflicts.

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<sup>83</sup>H.M. Hart J. and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1959) Cambridge, Massachusetts: Unpublished Tentative Edition, p. 205.



The Law Society of Upper Canada has recently completed an examination of the role of lawyers in ADR. A Dispute Resolution Subcommittee prepared a report and made a number of significant recommendations to the Law Society. It recommended that:<sup>84</sup>

- (a) the Law Society should set an example by employing alternatives to litigation whenever appropriate;
- (b) the Certification Board of the Law Society should give consideration to ADR techniques when setting out criteria for the certification of specialties in existing areas;
- (c) the Law Society should take steps to include dispute resolution education and awareness in the Bar Admission course, continuing legal education, and in Ontario law schools;
- (d) the Law Society should provide insurance to cover services provided by a member as arbitrator or mediator; and
- (e) the Rules of Professional Conduct should be amended to place a positive obligation on lawyers to inform their clients of alternatives to litigation and to respond to proposals for the use of alternative methods of dispute resolution.

### **ADR Recommendations**

The Civil Justice Review recognizes the value of Alternative Dispute Resolution mechanisms as a supplement to traditional court-based litigation. We recommend that the panoply of ADR options be available to members of the public from both within and outside of the traditional court system. Specifically,

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<sup>84</sup>"Alternatives", Final Report to Convocation, The Law Society of Upper Canada Dispute Resolution Subcommittee of the Research and Planning Committee, (February, 1993); as referred to in Adams and Bussin, *supra*, note 71, at p. 27.



**WE RECOMMEND:**

1. That educational programs continue to be offered through public and legal organizations to expand the knowledge and acceptability of ADR among the public and the bar;
2. That the Law Society proceed to implement the proposals of its Dispute Resolution subcommittee and, in particular, its draft proposal to amend the Rules of Professional Conduct to place a positive obligation on lawyers to inform their clients of alternatives to litigation and to respond to proposals for the use of alternative methods of dispute resolution;
3. That standards be developed by the ADR profession, in conjunction with the Law Society of Upper Canada and other appropriate professional organizations, for the accreditation of ADR practitioners who provide service to the public either privately or through court-connected facilities.
4. That the concept of court-connected ADR be accepted in principle, with the determination of the appropriate form of service model and funding option to await the evaluation of the ADR Centre pilot project and, in family matters, the outcome of the family mediation policy discussions presently in progress.
5. That provisions similar to those relating to the Windsor and Toronto case management projects respecting the dismissal of actions in circumstances of default be extended on a province-wide basis; and,
6. That early screening and evaluation mechanisms be built into the caseload management structure to be implemented in the province.

## CHAPTER 13.6

### PRE-TRIALS, SETTLEMENT CONFERENCES AND TRIAL MANAGEMENT CONFERENCES

#### Pre-Trials

A pre-trial is a meeting between a judge and counsel (sometimes, but not frequently, with clients present), usually at some point after the case has been listed for trial and before the trial. The concept of pre-trials was first introduced in Ontario in the 1970's. They are now obligatory. Trial dates are generally not assigned until a pre-trial has been held.

The purpose of a pre-trial is to consider,

- (a) the possibility of settlement of any or all of the issues in the proceeding;
- (b) the simplification of the issues;
- (c) the possibility of obtaining admissions that may facilitate the hearing;
- (d) the question of liability;
- (e) the amount of damages, where damages are claimed;
- (f) the estimated duration of the hearing;
- (g) the advisability of having the court appoint an expert;
- (h) the advisability of fixing a date for the hearing;
- (i) the advisability of directing a reference; and
- (j) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.<sup>85</sup>

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<sup>85</sup>Rule 50.01.

The practice is for counsel to prepare and file pre-trial memoranda setting out their version of the facts, the legal issues to be determined, and the status of preparations for trial, with relevant documents, including medical and other expert reports attached.

Properly conducted and prepared for, the pre-trial is an extremely valuable tool in the processing of cases. Many cases are settled, either at the pre-trial or shortly thereafter. In many others, the issues are narrowed for trial.

"Properly conducted and prepared for" are the operative words, however. While most people are supporters of the concept of pre-trials in principle, there is an emerging sense among lawyers -- and even some judges -- that they may not be as worthwhile as they once were. They are seen in some quarters as having become simply a perfunctory exercise -- a necessary formality before one can obtain a trial date. At another level, they are felt to have eliminated the former practice of lawyers discussing cases and settling them after examinations for discovery, as counsel and parties postpone the settlement decision until they get a reading on "what a judge might think". On occasion, judges and lawyers suspect each other of not being properly prepared. Counsel fret about judges being too "inexperienced" in a particular area to be able to help the parties to settle. Judges fret about counsel not performing their necessary function of advising clients on the hard realities of settling cases.

There is no doubt that pre-trials absorb a great deal of judicial time, and that the time and cost of counsel preparing for them are considerable as well. Currently, in some areas, when judges are designated to conduct pre-trials they are assigned as many as eight pre-trials a day, to be dealt with at 45 minute intervals. It is not realistic to expect them to be able to prepare adequately for such a chore, and 45 minutes is an inadequate period of time to conduct a successful pre-trial. Limited resources make it difficult to alter this pattern, however.

The comments of an outside observer on these questions are instructive. The Honourable Mr. Justice D. W. Shaw, of the British Columbia Supreme Court, visited Ontario in October 1994 for the purpose of examining the various initiatives underway in the province respecting civil litigation -- including the activities of this Review. He talked to judges, court officials, members of the bar, members of the Attorney General's Ministry and to U.S. judges and experts who attended the Geneva Conference outlined earlier in this Report. In the course of those discussions he formed the following view with respect to pre-trials:<sup>86</sup>

I talked to numerous judges and counsel on how obligatory settlement conferences have fared. The overwhelming majority voiced the view that they have outlived their usefulness. They say that pre-trials were initially quite useful, but over the years their usefulness has considerably diminished. Briefs have become more a matter of form than substance, counsel are often ill-prepared and judges often simply 'split the difference' rather than put in the effort required to get to the heart of the matter. There is a strong perception that the pre-trials have become perfunctory and a waste of time and money. There are of course exceptions. Many judges still put considerable effort into this duty and many counsel do as well. And in the family area as well, obligatory conferences as part of the Toronto Family Case Management Project appear to be essential and successful.

I think that the Ontario experience raises significant questions. A great deal of judges' time, lawyers' time and clients' money are expended by having settlement conferences in all cases. Is it worth it? Is there a better way? While settlement conferences for some cases are undoubtedly useful, my view is that there should be some pre-requisite such as requiring the consent of the parties before we cut into the limited time we have for judging to do what good lawyers should be doing, that is, advising on and negotiating settlements.

We share the concerns expressed above about the present state of the pre-trial conference. However, we do not share the same sense of doubt. A properly conducted and prepared for pre-trial is not only possible -- it has worked before --

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<sup>86</sup>Report of the Honourable D.W. Shaw to the Honourable Chief Justice Esson and the Honourable Associate Chief Justice Campbell of the British Columbia Supreme Court, November 30, 1994. Cited with the permission of the author.

it is absolutely essential, in our view, for the effective operation of the civil justice system. A proceeding which arrives on the trial docket without having been pre-tried is simply a recipe for an inefficient and ineffective trial, and one which is a waste of scarce judicial time and supporting resources.

Rather than jettisoning a proven tool, we believe it essential to reshape that tool so that it re-acquires its usefulness in the modern system.

Under the pressures of present day litigation the purpose of the pre-trial has become blurred. Is it to settle the case? Is it to plan the trial? Is it simply an entry hurdle for obtaining a trial date?

It is all of these things, of course. One way of making the exercise more effective, in our opinion, is to make it clear precisely what the function is that is the focus of attention at the moment. While we do not agree with jettisoning the concept of a pre-trial, we believe that the name "pre-trial" should be jettisoned. We believe it should be replaced with two separate and recognizable concepts: a "settlement conference", and a "trial management" conference. In the case management context, these two techniques can be supplemented by other "case conferences", from time to time as appropriate, throughout the processing of the case.

### **Settlement Conferences**

A settlement conference is exactly what the name implies. Its sole focus is the attempt to resolve the dispute, or at least parts of the dispute. Like any good pre-trial of the past, the settlement conference will feature an amalgam of "interest based" mediation and "rights based" pre-trial direction from the judge. What form that mix takes will depend upon the nature of the specific case, and the skill and experience of counsel and the judge.

As a general rule clients are required to attend at pre-trials or settlement



conferences in family law matters. This is not the practice, however, in non-family law litigation. There was some suggestion, during our consultation phase, that the lack of clients' presence at these proceedings leads to skepticism on the part of the public regarding the process. Whether that is true or not, we feel that it is useful, from the settlement perspective, for clients to be present with their lawyers, or at least readily available for purposes of discussion and the provision of instructions.

A *settlement conference* should be the step necessary before a proceeding is placed on the list of cases ready to be tried. At present, a proceeding may be set down for trial after the exchange of the pleadings, and 60 days thereafter it will be placed on the trial list.<sup>87</sup> While the practice is that matters are generally set down for trial after examinations for discovery have been held, and while the Rules of Civil Procedure provide that a party who has set an action down for trial may not take any further pre-trial proceedings without the consent of the Court, in reality the majority of cases find their way onto the trial list without being ready for trial. There they sit, as part of a recorded "backlog", when they are not "backlog" at all. The effect of this is, at a minimum, to skew the data upon which those in charge of managing and administering the system must base their decisions.

Only where the dispute has not been settled within a reasonable period of time after a settlement conference -- we suggest 30 days -- should it be listed for trial. Cases which have not been through this process are not sufficiently ready for trial to be placed on that list, and counted amongst the Court's inventory of matters to be reached *for trial*.

Once the case has been listed for trial, it should be scheduled for a trial management conference within a further 120 days.

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<sup>87</sup>Rule 48.10.



### **The Trial Management Conference**

At the trial management conference the case is prepared for trial, from the Court's perspective. Witness lists are exchanged and discussions held about how the evidence may effectively be introduced -- agreed statements (where possible), witness statements (if appropriate), or some combination of witness statements and oral examination and cross-examination. Chronologies, descriptions of the parties and others involved, corporate diagrams if relevant, admissions, compendiums of documents and how the documents are to be managed, joint books of legal authorities -- these form the grist of the exercise. Issues are defined. And finally, a reasonable and achievable trial time is estimated.

Trial dates should not be assigned to cases until after a trial management conference has been held.

Trial management conferences are becoming more common. Experience indicates that they can play a very effective role in streamlining and optimizing the use of trial time. While there is clearly some upfront cost in this process -- for the lawyers in terms of preparation and for the client in terms of legal fees -- the ultimate savings that would flow from its broader implementation to the client in fees and to the administration and public generally, in terms of the demand on public resources, would be quite tangible in our view.

Settlement conferences and trial management conferences are also an imposition on judicial time. Some people wonder whether it makes sense to divert judges' efforts from trials for those purposes.<sup>88</sup> To this concern we offer the following comments.

First, if a potential trial can be averted altogether by settlement and a judge can play a role in helping the parties to reach that point, the judge's time has been valuably spent. It is part of the function of judges to assist people in resolving their

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<sup>88</sup>This concern was reflected in the Report of the Honourable D.W. Shaw, *supra*, note 85.

disputes. To the extent that a trial has been avoided, the potential trial time is freed up for other cases that must be tried. Where a lengthy trial would have ensued, the benefits to the parties and to the system, in terms of time and money and resources saved are magnified.

Secondly, an effective trial management conference will result in similar "savings". Trials are shortened. The parties' cases are more effectively presented. The judge is able to render a decision more quickly. Again, the negatives of utilizing judge time in this fashion are outweighed by the advantages, in our view.

Finally, however, we do not believe it is necessary for judges alone to perform these functions. There is no reason why judicial support officers, with proper training and experience, cannot participate in some settlement conference and trial management conference processes. With judges and judicial support officers working within the framework of a caseflow management and team concept, the need for judicial input where necessary can be preserved. In some cases, it may not be necessary at all.

## **RECOMMENDATION**

**We recommend,**

- a) that the concept of "pre-trials" be replaced by two distinct processes, the "settlement conference" and the "trial management conference";**
- b) that cases not be listed for trial until after a settlement conference has been held and no settlement reached within 30 days of the settlement conference; and,**
- c) that cases not be assigned trial dates until a trial management conference has been held.**

The establishment at a trial management conference of an agreed trial procedure, and, in particular the establishment of a reasonable estimated trial time,

is a critical element in the smooth operation of the overall trial schedule. We heard almost universally from the Bar, and to some extent from the Public and the Judiciary as well, that fixed trial dates -- or something as close as possible to fixed trial dates - were a necessity. Fixed dates for trial, or even those remotely close to being fixed, cannot be provided unless there is some degree of certainty in the expected disposition of cases.

Of equal importance to the establishment of these parameters for trial, then, is the reasonable adherence to them by counsel and their reasonable enforcement by the trial judge. The trial judge must be willing to do this, and must have some sanction in support of that willingness. While it must be exercised with great discretion and care, we believe that cost sanctions are appropriate.

## **RECOMMENDATION**

**We recommend that consideration be given to amending the Rules of Civil Procedure to authorize a judge to impose cost sanctions on counsel who unreasonably delay the time of trial beyond the agreed estimated time by their unreasonable conduct of the trial or who have given an unrealistic estimate of the trial time needed at the trial management conference.**

It may be that there are simply too few resources in the system to justify this overall settlement conference/trial management approach for *all* cases, and that there should be some monetary or other limitation below which a case does not qualify for both settlement conferences and trial management conferences. This concept needs to be examined further. As the results of implementation of the Simplified Rules proposal are monitored and evaluated, an assessment can be made of what, if any, settlement or trial management process is required.

## **CHAPTER 13.7**

### **DISCOVERIES**

#### **Introduction**

The stage of a lawsuit between the delivery of the pleadings and the pre-trial or settlement conference is typically referred to as the "discovery phase" of the litigation.

In the pleading stage the parties exchange documents setting out their claim and defence. The issues in the lawsuit are defined. Following the completion of this stage, the parties have an opportunity to learn more about the each other's case through the disclosure of documents and the pre-trial examination of the party or parties adverse in interest.

Rules 30 to 32 of the Rules of Civil Procedure, in particular, lay out the specific requirements which mandate the disclosure required. Broad and complete disclosure is the standard. When the Rules of Practice were revised in 1985, a primary focus of the revisions was to broaden the scope of pre-trial disclosure and discovery. The theory behind this concept seemed very sound: the more complete the pre-trial disclosure, the more likely it was that settlements would occur.

#### **The Purpose of Discovery**

The primary goal of the discovery process is to ensure open and full disclosure in order to facilitate settlement efforts and to make the trial process more effective and fair. More specifically, examinations for discovery serve essentially the following purposes:

- a) to enable a party to assess the strengths and weaknesses of the other party's case through documentary production and oral examination of the facts and information which the other party has about the case;

- b) to enable a party to assess the strengths and weaknesses of its own case;
- c) to obtain admissions which may be used at trial, and which will dispense with the time and expense of lengthy proof at trial;
- d) to use at trial, either as part of the evidence to be led or for purposes of impeaching the testimony of the other party; and, finally, as a result of the foregoing; and
- e) to promote settlement.

### **Oral Discovery: Growing Concerns**

In the popular jargon of the legal profession, the term "discoveries" is generally used to refer to the oral examination of the parties. While examination for discovery may take place through written questions and answers, this method is rarely used. Oral examinations are conducted under oath and a written transcript of that examination obtained.

The examination for discovery of any party adverse in interest is considered, by the bar and others, to be a critical feature in the conduct of the litigation. Indeed, the discovery and disclosure process does perform an important function in preparing cases for trial or settlement. The question we have been forced to ask, as a result of the views expressed by many in our consultation stage, is whether the discovery process is now out of hand. Has it become too cost-prohibitive and delay-engendering to continue in the present fashion without the imposition of some form of curb?



The process can certainly be time-consuming and correspondingly costly. We were provided with a great many anecdotes to the effect that oral examinations are becoming longer and longer. In addition to the time spent in the examiner's office for the examination itself, time is required to schedule the examinations at mutually convenient times (something which becomes more difficult in multi-party suits). Time is required to prepare witnesses for the examination. Time is spent travelling to and from the examination. Time is spent reporting to clients. Time translates into money. The purchase and analysis of transcripts of the evidence translates into more money. Where undertakings are given at the time of the examination to obtain information which is available but not in hand, more time is involved in responding to those undertakings. Occasionally, the responses to the undertakings may necessitate a further examination.

In addition, there are a significant number of motions relating to discovery that are brought before the courts. These motions may be substantive in nature -- asking the court to determine the appropriateness of the questions asked at the examination -- or they may be more purely procedural -- for example, compelling the answers to undertakings. In either case, they are time-consuming and expensive, and they occupy needed courtroom space. While there is no reliable data available to indicate the percentage of all motions that are discovery-related, the Toronto Masters estimated that 25% of all motions brought before them involved discovery issues.



In the COSTS chapter of this Report, we have attempted to assess the cost to a litigant of an average 3-day trial. Our calculations were based on what we felt was the not unreasonable assumption that such a trial would have involved at least two days of examination for discovery, plus preparation, for a total of 25 hours. In addition we estimated a further 10 hours of counsel time involved in documentary disclosure. At an average cost of \$200 per hour for legal fees, the discovery part of the process, excluding any motions or other steps that might relate to it, could result in legal fees alone of \$7,000. These are substantial costs for a client to bear.

### **The Simplified Rules Initiative**

In 1993, the Simplified Civil Rules Sub-Committee was formed at the request of the late Chief Justice Callaghan and the former Deputy Attorney General, George Thomson. The Committee was formed in response to a growing concern over the cost of litigating relatively modest lawsuits.

The dilemma is significant, both for lawyers and for their clients: how does the system preserve the value and necessity of disclosure in civil cases while at the same time keeping the expense of the litigation process within reach of litigants and enabling lawyers to work within cost-effective parameters?

The Simplified Rules Subcommittee concluded that a more simplified procedure is required for cases involving money or property claims where the amount

in issue does not exceed \$40,000. Central to its proposal is the recommendation that oral examinations for discovery be eliminated in such cases.

We deal with Rules and the Simplified Rules proposal separately, in Chapter 14. Suffice it to say here that, while we recognize the controversial nature of this recommendation, we have concluded, on balance -- as did the Subcommittee -- that the proposal should be supported.

### **The Scope of Discovery**

The broadened scope of examinations for discovery in cases that will not be affected by the Simplified Rules proposal remains a concern, in our opinion. As stated earlier, the Review heard many accounts of the growing length of examinations and the expression of serious doubts about the value of these prolonged examinations.

While the 1985 amendments to the Rules had the commendable intent of eliminating "trial by ambush", they may well have led, instead, to "trial by information landslide". The 1985 amendments considerably broadened the scope of the examination by allowing:

- a much wider range of questioning
- cross-examination of the person being examined (except as to credibility);

- discovery of evidence;
- cross-examination on the affidavit of documents;
- discovery of the names and addresses of potential witnesses and persons having knowledge of the matters in issue;
- discovery of the findings, opinions and conclusions of experts retained by a party;
- discovery of the existence and contents of any relevant insurance policy.

In addition, the explosion of information sources and available data as a result of the growth in technology has led to an enormous increase in the material available for discovery purposes. This development, in combination with the broadened discovery rules, has made it increasingly difficult to cope economically with the scope of discovery.

In a case managed environment, there may be opportunities in the course of the case conference process to streamline the discovery process. The current situation nevertheless requires a reassessment of the Discovery Rules and the Review invites comments, pending its final Report, on the possibility of re-entrenching the scope of discovery and of other possible measures such as the elimination of cross-examination on the affidavit of documents.

**RECOMMENDATION:**

We recommend that consideration be given, by the Rules Working Group of the Implementation Team, to methods of improving the examination for discovery process in ways that will make it more economically effective while at the same time preserving its essential disclosure principles. Some areas to be considered in this exercise are:

- The possible re-entrenchment of the scope of discovery to pre-1985 limits
- Removal of the right to cross-examine at discovery
- Time parameters for the conduct of oral examinations

## CHAPTER 13.8

### MOTIONS

Given the current state of the civil justice system, and the pressures on it, court time is a precious commodity. There are two aspects to this. First is the demand for the use of courtroom space, and the need to utilize that space effectively. Second is the demand upon the allocation of judicial resources, and the need to allocate those resources effectively. In the Chapter of this Report dealing with BUILDING PRESSURES AND TRENDS, we have noted an increase in the amount of time that courtrooms have been utilized over the past 5 years.<sup>91</sup> While court time is typically thought of in terms of trials (civil or criminal), there is a substantial part of the court docket in civil matters and a substantial amount of space that is dedicated to the hearing of motions.

The number of motions dealt with by the courts over the past 5 years has increased considerably -- by more than 100% in general civil matters, and by more than 150% in family matters.<sup>92?</sup>

A "motion" in a civil case is a request to the Court for a decision on an issue or procedural point which occurs as part of the case. The decision does not normally dispose of the whole case (and is known as an "interlocutory" decision, and the motion as an "interlocutory" motion when that is the case), although it may do so.<sup>93</sup> The nature of the relief sought can be quite varied, as motions relate to all issues that can arise in the course of the litigation except for the judgment itself.

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<sup>91</sup>See Chapter 4.3.

<sup>92</sup>Ministry of the Attorney General, *Court Statistics Annual Report, Fiscal Year 1993-1994*, supra, note 65.

<sup>93</sup>This is the terminology employed in the Zuber Report, supra, note 2, (see Glossary of Terms, p. x), and avoids the confusion between "motions" and "applications", which have different technical meanings and which attract different procedures.

In Family Law matters, interim motions are of critical importance as they generally determine the positions of the parties while they await the outcome of the final litigation, particularly with respect to matters of custody, access and support. Orders obtained on an interim basis are rarely changed at trial. A separate part of this report will recommend specific changes to the Family Law process.

We have been advised by the Bar that the average cost, in terms of legal fees, to bring a contested motion to the court is in the neighbourhood of \$2,000.

Members of the Bar also targeted Motions Courts as the largest waste of a lawyer's time in the range of court proceedings. They sit around and wait for their case to be called. The cost of this idle time must either be passed on to their clients, thus inflating the expense of the lawsuit to the litigant, or absorbed by the lawyers, thus reducing and sometimes eliminating the profitability of the step for them.

In the majority of Motions Courts around the Province, it seems that the practice is to schedule all routine motions to a particular day of the week or month, and to make them all "returnable" at the same time. The Rules of Civil Procedure also prescribe where the motion is to be heard -- generally in the court in the jurisdiction where the office of counsel for the responding party is located.<sup>94</sup> It is not unusual to have motions lists before a single judge containing 25-50 matters to be dealt with in a single day. All parties are summoned to the court at the same time, regardless of their placement on the list. Parties who are not located close to a court house incur travel costs or agency fees to retain counsel to appear on their behalf.

Many complained to us during the consultation phase about abuses of the motions process: about the significant cost; about the waiting around; about judges

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<sup>94</sup>Rule 37.03 (1).



not being prepared because they have not read the materials (*lawyers and clients* complained about this); about having to spend hours reading the materials in advance, only to have lawyers or clients adjourn the motion at the last minute, thus rendering *that* time wasted (*judges* complained about this); about the process being utilized for unnecessary motions, often brought for tactical reasons simply to wear the other party down; and just generally, about the inefficiencies of the system.

On the other hand, there is a recognition that systemic delay in bringing cases on to trial creates a situation where more interlocutory matters need to be determined by the Court. This leads to the continued pressure of a rising rate of motions.

We are confident that the system of caseflow management which we are recommending be implemented will lead to fewer motions being brought than might otherwise be brought in a system that continues to be non-case managed. The greater familiarity of the judge with the case, and the opportunity presented by case conferences for parties to resolve outstanding matters -- including matters relating to procedure and the logistics of the case -- should lead both to fewer motions and to the more expeditious disposition of those which do proceed.

Unnecessary motions -- and the unnecessary opposition to motions -- need to be discouraged, however. This is particularly true until such time as case management systems have been put in place, although the principle will continue to be important thereafter.

There is provision under the Rules of Civil Procedure for the Court to impose cost sanctions upon parties, and upon their lawyers, where the motion ought not to have been brought or ought not to have been opposed, where costs have been unreasonable or wastefully incurred, or generally where the conduct of a party has

unnecessarily prolonged a proceeding.<sup>95</sup> We were repeatedly urged by counsel to recommend that more widespread use of these sanctioning powers be made.

### **RECOMMENDATION:**

**We recommend that courts be more vigilant in exercising their cost sanctioning authority under the Rules in cases of abuse regarding motions and motions procedures.**

Even where unnecessary motions have been eliminated, however, there is still a need to manage the hearing of those which will continue to be brought in a more cost-effective way. Some of the suggestions that the Review has heard include:

#### "Purging the list":

Purging the list is a practice where the presiding judge attempts at the outset of the day to determine which of the matters scheduled for the day will be proceeded with. It is frequently the case that one side will be seeking an adjournment and a practice has developed of granting the adjournment if the request is reasonable. Similarly, it is often the case that the parties have resolved the matter in the intervening time between the commencement of the motion and the hearing date. Accordingly, some judges will canvass the court to determine if there are any consent adjournments or matters that can be disposed of by consent. Once the judge determines the matters that will require argument, he or she can determine the approximate time required for each matter. Counsel can then be invited to re-attend at a later appointed time. Unproductive and costly waiting time can be significantly reduced in this fashion.

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<sup>95</sup>See *The Courts of Justice Act*, R.S.O.c. c-43, s. 131, and Rules 57.01, 57.03 and 57.07.

### Staggered Start Times:

As set out above, the practice is generally to have all motions scheduled to come before the Court at the same time. Why could "morning lists" and "afternoon lists" not be scheduled? Such a practice would break up the list and at least minimize some of the waiting time. There is a risk of some "judicial downtime" and some "court downtime" in such a proposal, we recognize, because lengthy motions lists sometimes collapse as a result of last minute adjournments or settlements. Proper scheduling techniques can minimize this risk, however.

Counsel can be required to notify the court by early afternoon of the day before the motion is to be heard whether it is to proceed or not. The establishment of time estimates, compliance with those estimates by counsel, and their enforcement by the judiciary when counsel do not comply, would facilitate the scheduling process, and allow the administration, with experience, to gage the appropriate number of matters to schedule in order to ensure a viable list. Finally, most judges have a sufficient amount of work to do, in the form of reserved decisions, paperwork procedures and administrative duties, that they will not be sitting idly around while awaiting the resumption of Motions Court if a list collapses.

The concept of staggered starting times, along with that of "purging of the list," we believe, can go a long way towards minimizing the waste of time and resources which now too frequently accompanies the process of dealing with motions.<sup>96</sup>

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<sup>96</sup>We have not dealt with "Applications" in this section. An Application is like a Motion in the sense that it involves a presentation to the Court by way of written evidence and materials, accompanied by (normally) oral argument. It is different from a Motion in the sense that the decision rendered is like a judgment disposing of the entire case. Applications in family law matters have increased substantially in family law matters over the past 5 years, but Applications in other matters have decreased substantially: see the *Court Statistics Annual Report, Fiscal Year 1993-1994*, supra, note 65, of the Ministry of the Attorney General. Applications are disposed of in the "Motions Court" setting, however, and therefore from part of the workload which must be dealt with in this sort of proceeding.

### Limiting the Time for Argument:

As part of the motion process, a party must prepare a Motion Record and serve it on the opposing party prior to the hearing of the motion.<sup>97</sup> The judge receives the Motion Record in advance of the hearing and accordingly has an opportunity to review the written materials outlining the nature of the relief requested and the materials in support of the request, in advance. Judges and lawyers have both indicated to us, during the consultation phase, that oral argument on Motions is frequently repetitive of the written material and sometimes repetitive of itself. It takes too long, and counsel do not always abide by their time estimates. Judges do not require counsel to adhere to their time estimates often enough.

In the Supreme Court of Canada oral argument is time limited. It has been suggested that this rule be applied in the lower courts as well.

### Limiting the Material Filed:

Anecdotal evidence suggests that the volume of material filed in support of motions is growing. Technology has played a role in this development, as it allows for easy storage and transmission of vast amounts of information. The increased amount of material makes it more difficult for the presiding judge to read all materials in advance and adds to the length of time required in court as counsel must spend more time educating the court about their case. In the Family Law area, the volume and content of affidavit material filed in support of motions for interim relief is a cause of particular concern and has led to suggestions for limited or standard form affidavits. In the Court of Appeal, written argument is limited by Practice Direction of the Chief Justice to no more than 30 pages without permission of the Court.<sup>98</sup>

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<sup>97</sup>Rule 37.10 (1).

<sup>98</sup>(1993) 13 O.R. (3d) 67.

**RECOMMENDATION:**

We recommend,

- a) that limits be placed on the length of written submissions to be filed on motions and applications, such limits to be adhered to unless the court grants an exception;
- b) that the Rules Working Group of the Implementation Team examine ways of reducing the volume of paper put before the court on motions and applications; and further,
- c) that the Rules Working Group consider the advisability of staggered starting times for Motions and Applications and the practice of "purging the lists" as means of reducing the time and resources attributable to those procedures.

**Use of Tele-Conferencing and Video-Conferencing**

Other methods of reducing the necessity for in-person attendances by counsel on Motions include tele-conferencing and video-conferencing. The Rules of Civil Procedure presently permit Motions and pre-trials by conference telephone.<sup>99</sup> There are no provisions as yet for video-conferencing.

These type of proceedings save attendance and travel time, and would result in savings being passed on to clients. Their use seems particularly appropriate for the courts in the Northern Ontario and other locations where travel distances are significant. Video - conferencing technology which is currently available, would overcome any concerns that stem from the lack of visual contact.

We have recommended elsewhere in this Report that steps be taken to introduce video-conferencing technology into the system.

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<sup>99</sup>Rules 37.12 and 50.08.



## CHAPTER 13.9

### VENUE

"Venue" is the legal expression used to describe the place where the trial of a law suit is held.

There are currently 50 locations across the Province where the Ontario Court of Justice (General Division) presides, and, with few exceptions, a plaintiff is entitled to choose any one of them as "the venue" for the case.<sup>100</sup> Normally, all motions and preliminary proceedings leading up to the trial, including the pre-trial, are dealt with in the same location.

Family Law cases are the primary exception to the general rule that the plaintiff chooses the venue. In family law matters involving claims for the custody of children, the petitioner or claimant must name as the place for trial the place where the Court normally sits in the county in which the child normally resides.<sup>101</sup>

Parties can apply to the Court to change the place of trial. However, such an order will only be made where the party seeking the change can demonstrate that the balance of convenience substantially favours another venue or that a fair trial is not possible in the place named.<sup>102</sup>

The Court has no power under the Rules of Civil Procedure, or by statute, to change the place of trial on its own initiative. Nor can such a change be ordered without the consent of the parties, except on the foregoing basis, although in one case a judge has ruled that a judge at a pre-trial conference has the authority to order a

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<sup>100</sup>Rule 46.01.

<sup>101</sup>Rules 69.17 and 70.05.

<sup>102</sup>Rule 46.03(2).



change of venue at his or her own initiative, without the motion or consent of either party.<sup>103</sup>

Needless to say, the right of plaintiffs to choose the county in which they wish to have their cases tried is an important right, but its relatively unchecked nature introduces a variable into the system which has a significant impact on the allocation of judicial and administrative resources throughout the Province. In Toronto, for instance, it is estimated that more than one-third of the Region's caseload consists of actions and proceedings in which neither the subject matter nor the parties have any substantial connection with Toronto.

Historically, counties were the juridical unit in Ontario, and the county towns became the centre for the administration of justice. Indeed, the Province did not assume responsibility for the overall administration of justice from the counties until 1968. Changes in the demographics of the province, and the institution of regionalization in 1990, have further diminished the importance of the "county" court structure. Urban centres have grown relentlessly, and in some instances, the traditional county has been surpassed in size and importance by other municipalities.

One of the effects of these changes is that the demands on courtroom facilities and resources across the province are uneven. There are communities in which the facilities are chronically overtaxed. In other communities, the facilities are sometimes overtaxed and at other times, under-utilized. In still others, the facilities are regularly under-utilized.

All courtrooms may be in use and the judiciary completely occupied in one particular community, yet a judge and courtroom may be available in a nearby community within a relatively short commuting distance. At present, while they have

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<sup>103</sup>*Campbell v. Stainton*, (1985), 50 O.R.(2d) 283 (H.C.J.).

control over the allocation of judicial resources in such circumstances, the Chief Justice and the Regional Senior Justices have very little ability to deal with the disparity of demand on courtroom space and facilities.

Why should the Regional Senior Justice, in his or her discretion, not have the power to order that a case waiting to be tried in the busy centre with the clogged list, or an application or motion that cannot be reached, be transferred to be dealt with in the idle courtroom of the nearby community ? We can see no reason in today's mobile society why this should not be the case. While there may be some added expense and inconvenience to the parties, or to their lawyers, in travelling the extra distance, such additional costs as there may be are more than offset, in our view, by the ability to have the trial completed earlier and the general ability to augment the maximum utilization of available resources. Every day people commute long distances to work, or travel hither and yon for much less significant reasons than the trial or other disposition of their legal proceedings. Why not for that purpose as well?

Any difficulties arising because of distance, expense, location of parties or witnesses -- and all of the traditional "venue" sorts of considerations -- can be taken into account by the Regional Senior Justice in exercising the discretion whether or not to order the change.

A proposal was previously submitted to the Rules Committee recommending that the Regional Senior Justices be given such authority. It is apparently still under consideration. The Review recommends the adoption of such a Rule.

## **RECOMMENDATION**

**We recommend that the Rules of Civil Procedure be amended to provide Regional Senior Justices with the discretionary authority to order, on their own initiative or at the request of one or more of the parties, that a proceeding be transferred from**

**one court centre to another within the same Region. We further recommend that authority extend to the transfer of a proceeding between court centres between Regions, with the concurrence of the Regional Senior Justices of each Region in question.**

The subject of "venue" raises a number of other important and difficult issues regarding the ability of litigants to determine where their proceedings should be dealt with, and by whom, and about the allocation of judicial and court resources in the province generally. There presently exists a Committee, established at the instance of the Deputy Attorney General, and consisting of representatives of the Ministry, the Bar and the Judiciary, which is examining these questions. Its Report is expected in the spring of 1995. The Review will await receipt of a copy of this Report before making further recommendations regarding the question of venue. Those recommendations will be outlined in our Final Report, to be published later this year.

## CHAPTER 13.10

### ENFORCEMENT

The term "enforcement" used by the Ministry of the Attorney General to refer to a cluster of activities formerly carried out by the Sheriff's offices. More recently, the Family Support Plan has begun to exercise these functions as well.

These activities include:

- Searches - of Names Registered against the title to real property to determine if there are outstanding judgment or liens;
- Processes - the personal service of court documents upon people;
- Executions - Writs of seizure and sale, Notices of expiry, Writs of possession filed and Levies conducted, Garnishments and generally all steps taken to enforce the judgment;
- Trust Account management - matters pertaining to payments received and disbursed to creditors.

The search function has recently been automated and appears to be functioning well at this time. Recommendations with respect to cash management set out elsewhere in this Report address the Review's concerns about the financial aspects of the enforcement operations. This chapter will limit itself to the enforcement of judgment and process serving issues.

#### **The Enforcement of Judgments**

With respect to the enforcement of judgments, it comes as a surprise to some litigants that, save for support and custody orders, the courts do not enforce their own orders. In reality, the order belongs to the party that obtained it, and it is up to that party to determine which course of action it wishes to pursue in having that order enforced. Additional fees are payable to the court office for each separate enforcement activity undertaken.

The Review heard from users of the system that there is a lack of consistency between various courts with regard to the enforcement procedures available. The enforcement processes in Small Claims Court are relatively straightforward and the process is easily understood. General Division enforcement procedures, which are designed to produce the same result, are considerably more complex. It is not readily apparent to us why this should be so in principle.

Similarly, the relationship between the originating process and the resulting enforcement procedure does not appear to be well thought out. Landlord and Tenant matters are dealt with in a rather simplified manner; it is the one area of the General Division where significant members of unrepresented persons are able to proceed on their own. The forms are of the "fill-in-the-blank" variety. Obtaining a writ of possession that can remove a tenant who has not paid his or her rent is a relatively uncomplicated, albeit paper-intensive process. Where a judgment obtained is for the payment of the rent arrears, however, all of the complex processes required to enforce General Division orders come into play.

The range and depth of enforcement procedures in the different courts produces further inconsistencies. In Small Claims Court, a judgment debtor can be summoned to a hearing to be examined for the reason of nonpayment.<sup>104</sup> Where the debtor on whom such a notice of examination has been served fails to attend the hearing, the court may issue a warrant of committal to have the debtor jailed for a period not exceeding 40 days. The practice is initially to issue a committal letter warning of the possible committal unless the debtor attends before the court to explain why the warrant should not be enforced.<sup>105</sup> While the warrant is not issued for the non-payment of the judgment but for the presumed contempt for not

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<sup>104</sup>Small Claims Court Rules, Rule 21.10 (4).

<sup>105</sup>Small Claims Court Rules, Rule 21.10 (9).



appearing for the judgment debtor examination, this subtle distinction is lost on most debtors. In no other court can access to such a drastic remedy be so readily obtained.

For the fiscal year 1993-94, 2,151 committal letters were issued and 1,024 subsequent committal warrants were issued.<sup>106</sup> The Review has no information at this time as to how many debtors may have been actually detained as a result of this enforcement process but we have serious misgivings as to whether or not this practice should be continued.

It has been suggested that the enforcement of orders could be privatized and that the considerable resources currently expended by government in this area could be diverted to the resolution process. A preliminary analysis suggests that, in the cluster of enforcement activities, only the search function generates significant revenues over and above the cost of providing the service.

The most contentious area of enforcement appears to be the Family Support Plan. This is the one exception where the Court actively enforces all orders for the support of spouses and children. We comment further on this programme in the Family Law section of this report.

There are private bailiffs that are regulated by Statute and are licensed by the Ministry and Consumer Relations. There are concerns, however, that these may not be the appropriate agents to enforce all court orders and that some of these orders, for example, eviction orders in landlord and tenant matters, are more properly served by officers of the court.

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<sup>106</sup>Information Planning and Court Statistics.



## Process Serving

Currently the rules of Civil Procedure require that a substantial number of court documents be served personally. The requirement of personal service has resulted in some concerns both with regard to the costs of this service and the level of service provided.

Personal service of documents is a critical feature of our litigation process. Because of the requirement of personal service of initiating documents, our system of adjudication allows default judgment for a certain class of claims to be dealt with administratively. Since the consequences of being served with a document and of not responding to it can be severe, personal service is regarded as the most effective way of ensuring that a party has indeed received notice of a claim. With the advent of technology and other forms of message delivery, e.g., courier service, there may be other lower cost and equally effective methods of service.

In the North of the province, the requirements of personal service can add significantly to the cost of litigation as the litigant must pay a fee for the service and a kilometre allowance for the distance actually travelled.<sup>107</sup> Where these distances are great, the cost impact increases accordingly.

As a result of a decision of the Ontario Public Service Labour Relations Tribunal process servers, who formerly worked on a fee basis for the Ministry of the Attorney General, were found to be civil servants for labour relations purposes, and their employment relationship was altered to make them government employees. Workload indicators were developed to determine the number of persons required.

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<sup>107</sup>O. Reg. 294/92 as am.O.Reg. 431/93.

We were advised that in the North the allocation formula has resulted in an insufficient number of persons being available to provide adequate service. We were also advised that work volumes were not sufficiently large enough to encourage the development of a private sector option.

Elsewhere, there did not appear to be the same complaints with respect to cost or with respect to service. This was another area where it was suggested that the private sector could provide this service at a lesser cost to government. Proposed Criminal Code amendments<sup>108</sup> will allow for the service of subpoenas by persons other than peace officers which may create other opportunities for private sector service of documents.

In principle, the Review is of the view that government should not be providing services where these may be readily available elsewhere.

The Review has no specific recommendations with respect to these enforcement topics at this time and will defer these to the Final Report. We invite further comment on these issues and, in particular, with respect to the following:

- The appropriateness of existing enforcement mechanisms; in particular, the use of warrants of committal in Small Claims Court;
- The level of service provided by the courts and the degree to which the public is well served;
- The requirements of service and options to personal service in particular; and
- The extent to which these services should be provided by the courts.

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<sup>108</sup>Bill C-42 s.72.

# **CHAPTER 14**

## **THE RULES OF CIVIL PROCEDURE**

### **AND**

## **THE SIMPLIFIED RULES PROPOSAL**

### **Introduction**

Practice and procedure in the Ontario Court of Justice (General Division) are governed by the Rules of Civil Procedure. "The Rules", as they are called, are lengthy, complex, in places difficult to understand, and perceived as slow to adapt to change. Not surprisingly, they have therefore been the subject of some comment, and criticism, during our consultation phase.

Some of the frustration targeted at the Rules springs from a prevalent sense that the law and its attendant regulations, rules and procedures in their entirety are not easily understood by laypeople. Indeed, they are sometimes not easily understood by legal professionals! This perception is of a general nature, however, and not one that can be laid completely at the feet of the Rules of Civil Procedure.

Some of the frustration springs from a mystification about the Rules and about the process by which they are enacted, and about their purpose. Some, however, springs from the recognition that the Rules, in an administrative sense, may not have caught up with the techniques of today and that they can be the source of unnecessary paper and procedures that add time and cost to civil litigation. There are many disputes in the system which do not require all of the paraphernalia and protection provided by the Rules which were crafted to accommodate more difficult and complex cases. This latter circumstance has led to an initiative known as the "Simplified Rules" initiative, to which we will return later in this Section.

The Rules govern the conduct of proceedings in the General Division (and in the Divisional Court and the Court of Appeal). They govern the conduct of parties to those proceedings. They are necessary to provide the procedural framework within which disputes in the Courts are handled -- to tell the parties how and when things must be done in the course of the lawsuit and to provide procedural safeguards throughout the process. As the nature of people's disputes is as varied and intricate as the nature of people's relationships, rules of procedure which must attempt to encompass as many eventualities as possible are necessarily intricate, too.

A General summary of the kinds of procedures which the Rules encompass follows. There are rules governing:

- a) General Matters
  - Time and provisions respecting forms and court documents
- b) Who the Parties Are
- c) How Proceedings are Started
- d) How Documents must be Served
- e) How Certain Matters may be Disposed of "Summarily" without a Trial
- f) The Pleadings (i.e. the claim, the response, and related documents)
- g) Pre-trial Disclosure
  - documentary discovery
  - oral examinations for discovery
  - inspection of property
  - medical examinations
- h) How Examinations Out-of-Court are to be Conducted
- i) Motions and Applications
- j) The Ways in Which Parties' Rights may be Preserved Pending the Trial

- k) Pre-trial Procedures
- l) Trials
- m) References
- n) Costs
- o) Orders and Judgments and How they are Enforced
- p) Appeals
- q) Proceedings in certain Particular Matters
  - e.g., family law matters, proceedings concerning minors, mortgage actions.

Some thought, and a glance at the foregoing illustrates that some form of rules or regulations are necessary to deal with the areas mentioned, if litigation is to be conducted in an orderly fashion and with proper safeguards. It is also apparent, however, that a framework which endeavours to take into account all of these factors will contain within it the potential for built in delays, additional costs, and administrative headaches. Neither the Rules, themselves, nor the process by which they are made and changed should be so inflexible that adjustments cannot be made to counter such potential difficulties and to provide for adaptation to changing times.

The Rules have the force of regulations and are made by a Rules Committees created under the *Courts of Justice Act*.<sup>110</sup> There is a Civil Rules Committee, a Family Law Rules Committee and a Criminal Rules Committee. The Committees are large, and representative of the diversity of the Province. They are representative of the Judiciary, the Ministry of the Attorney General and the Bar, but there are no representatives of the Public.

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<sup>110</sup>See generally, the *Courts of Justice Act*, *supra*, sections 65-70.



Consistent with our view that the public needs to have a greater involvement in the civil justice system, we believe that the Rules Committees should contain public representation. We believe that the addition of the public to the rules making process will help to de-mystify that process for the public and may well lead to some de-mystification of the language of that process at the same time.

#### **RECOMMENDATION**

**We recommend that the Courts of Justice Act be amended to provide for the addition of public representatives to the civil, family and criminal rules committees.**

It has also been suggested to the Review that the rule-making process needs to be made more streamlined and timely. Changes that might bring about efficiencies can be delayed as they pass through the formalized process currently in place. There are somewhere between 25 and 30 members on each of the Civil Rules Committee and the Family Law Rules Committee, and as mentioned previously, the Committees are representative of the various parts of the Province. It is inevitable that the decision making process will move more slowly with so many participants involved. At the same time, a broadly based consultation process is essential to the success of the endeavour. Efforts need to be made to streamline the rule-making process and to make it as timely and as efficient as possible.

We have made a number of recommendations in this First Report which, if adopted, will require changes to the Rules. It is important that a working group be established to advise the Rules Committees with regard to the necessary rules changes that may be required to implement those recommendations.

#### **RECOMMENDATION:**

**We recommend that a working group be established, as part of the implementation team and in conjunction with the civil and family rules committees, to deal with the rule changes that will emerge from the recommendations contained throughout this First Report.**



Access to the Rules by the general public is severely limited. Those wishing to obtain a copy for their own information or in order to represent themselves, report difficulty in obtaining the texts and note the high cost of doing so when they succeed. In addition, the forms referred to in the Rules are themselves not available to the public and must be obtained from legal stationers, that they are not found in many towns and cities of this province.

If the civil court process is to be made more transparent and understandable to the public it is intended to serve, the Rules by which the system operates must be readily available in a reasonably comprehensible form. We make specific recommendations in this regard in the Communication chapter of this Report.

### **Simplified Rules Procedure**

In 1993, a Simplified Rules of Civil Procedure Subcommittee of the Civil Rules Committee was formed ("the Simplified Rules Subcommittee"). It was formed at the request of the then Chief Justice of the Ontario Court of Justice and the then Deputy Attorney General in response a belief that the costs to the parties of lawsuits involving relatively modest sums was disproportionate to the amount of the claims involved. These costs were identified as a serious problem for both the lawyers and their clients.

Lawyers and their clients, it was perceived, were discouraged from pursuing litigation involving smaller amounts because the costs of the litigation made it unprofitable for the lawyer and unproductive for the client.

These sentiments were borne out by the deliberations of the Simplified Rules Subcommittee. It noted, for instance, that the Zuber Report investigations had demonstrated that, for the claims within the \$25,000 monetary jurisdiction of the then District Court, winning litigant was left with only 20-30% of his or her judgment after paying the legal fees. It conducted its own research of a representative group of files

in 6 different court centres with a view to determining the relationship between party and party costs and the size of judgments obtained. This latter research revealed the following:

•	<i>median</i> amount <u>claimed</u>	\$31,700.57
•	<i>median</i> <u>judgment</u> amount	\$15,166.95
•	<i>median</i> party and party bill <u>assessed</u>	\$5,694.47
•	<i>median</i> amount claimed for examinations	\$800.00

Since party and party costs typically represent between 1/4 and 1/2 of the amount actually billed to a client, these figures suggest that in the greatest number of cases litigants are paying a significant portion of the amount recovered in legal fees, even after recovery of party and party costs. If those latter costs are taken at an average of 1/3 of the amount paid to the winning party's lawyer, that party is still paying approximately 2/3 of the amount of the judgment -- not necessarily to be equated with the amount *recovered*, it should be remembered -- as the cost of the litigation. Since there are at least two parties to litigation, and assuming the losing party has a similar legal bill (plus the party and party costs paid to the winner), it appears that from an overall perspective there is much more that the judgment amount being expended by the litigants in most cases (i.e., the median case). From this, it is easy to conclude that a more economical means of resolving these smaller disputes is necessary.

That is precisely what the members of the Simplified Rules Subcommittee concluded. In their draft report dated December 1994, they state (at p. 4):

In considering the causes of the problem of unaffordable litigation, we saw high lawyer fees as more a product of the problem than the cause of it. In General Division litigation involving small amounts, lawyers face a seemingly insoluble dilemma. If the lawyer does not invoke all of the procedures available, even if the cost effectiveness of those procedures is out of proportion to the amount involved, the lawyer may be accused of

indifference to the client's interests or be exposed to an allegation of negligence. Alternatively, a lawyer simply may be unable to steer an inexpensive course because the opponent invokes all of the procedures available. We felt that, although the current Rules are admirably suited to litigation involving large sums of money, those same Rules, when applied to disputes over lesser sums of money, generate prohibitive costs.

To find a way to make litigation more affordable, we were guided by two principles. The first was that it is the procedure and not the lawyers that should be regulated. Thus, we rejected imposing fixed limits on party and party costs or on solicitor and client costs. The second was a proportionality principle that there should be a relationship between the procedures available to pursue or defend a claim and the magnitude of that claim. We tried to reduce the costs by striking a balance between the expense of procedures before trial and the value of the potential outcome. We concluded that there should be a simplified procedure, perhaps more accurately, a truncated procedure, for the lower range of monetary and property claims.

The lower range which the Simplified Rules Subcommittee settled upon was one the claim in question involves only money or property with a worth not exceeding \$40,000. The fundamental changes proposed by the Subcommittee consist of the following:

- 1) the elimination of oral examinations for discovery;
- 2) the elimination of cross-examination on affidavits in interlocutory proceedings;
- 3) a simpler, cheaper and faster method of getting cases on the trial list;
- 4) a more limited pre-trial; and,
- 5) a modified summary judgment procedure, linked with a new summary time-limited trial procedure.

Of the foregoing proposals, that relating to the elimination of oral examinations for discovery is the most controversial. Indeed, it is quite controversial, particularly in the areas of the province outside of the large urban areas. Oral discoveries, as we have noted in the Discovery Chapter of this Report, are a central feature of the litigation culture in our system. In some quarters, the proposal is seen as an attempt to impose "a Toronto solution" upon the rest of the Province, the argument being that the litigation culture is different in Toronto than elsewhere and that non-Toronto lawyers can handle smaller non-Toronto cases efficiently and effectively under the Rules as they presently exist.

There are strong arguments on both sides of this equation, to be sure. However, the Simplified Rules Subcommittee is comprised of judges, lawyers and administrators who are representative of the Province as a whole; and it consulted widely. It gave very careful consideration to all of the arguments, pro and con, on the discovery issue. We quote at length from the Subcommittee's very thorough conclusions in this regard:<sup>111</sup>

" The elimination of the examination for discovery may be the most controversial aspect of the committee's proposal. We considered at length the pros and cons of eliminating discovery. We felt that the elimination of discovery would both directly and indirectly reduce the costs of litigation. Obviously and directly, eliminating discoveries would eliminate the costs of the discovery itself, but a discovery does not consist only of a few hours in an official examiner's office. There is the preparation for it, including discussions with the client and, perhaps, some of the witnesses; the scheduling and rescheduling of the examinations; the expense of travel time; the conduct of the examination (and it is plain that the examinations themselves are getting longer, often much longer); the advising of the client afterwards; the purchase and analysis of the transcripts; the answering of undertakings; and follow-up examinations. The direct costs to the client for discovery are substantial. Indirectly, eliminating discoveries would eliminate the commonly occurring interlocutory motions resulting from difficulties in scheduling discoveries and

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<sup>111</sup> Draft Report of the Simplified Rules of Civil Procedure Committee, December 1994, pp. 6-7. The Committee held 17 meetings itself and attended 13 additional consultation meetings across the Province.



from refusals to answer discovery questions or undertakings in a timely fashion.

Some lawyers see discovery as essential. *We do not dispute that discovery has advantages, but we do not agree that its advantages make discovery essential for every case, particularly those at the lower end of the monetary range.* In many lawsuits, both parties know their opponent's case before the action is started. Even though there is no discovery, neither party need be taken by surprise or be unable to analyze the merits of his or her opponent's position. It is to be borne in mind that most people are able to settle their disputes without any civil proceedings, that the small claims court functions satisfactorily without discovery, as does the arbitration of labour matters and other disputes, some of which involve large sums of money and complicated issues. Litigation in other jurisdictions functions satisfactorily without discovery. We were told that settlement of civil litigation throughout the world averages about the same regardless of the particulars of the rules of civil procedure.

The elimination of discovery may mean that some litigants will be less well-prepared to establish their own or to meet their opponent's case at trial; it would be idle to suggest otherwise. But that circumstance must be measured against the cost of the discovery and the magnitude of the money or property in issue. And it must be measured against the standard of whether justice can be done without discovery. We are satisfied that, for the defined range of claims, the simplified procedure will be adequate and that the usual and more elaborate procedure is not necessary to do justice."

The Civil Justice Review agrees.

## **RECOMMENDATION**

**We recommend the adoption of the proposal of the Simplified Rules of Civil Procedure Committee for all cases in which the claim is for money or property of a worth not exceeding \$40,000.**

## CHAPTER 15

### RECORDS MANAGEMENT

The role of the Anglo-Canadian court as record keeper is rooted in historical tradition dating back to pre-Norman England.<sup>115</sup> As part of his new ordering of things, William the Conqueror introduced record keeping into twelfth century courts. Since that time, public records have come to mean, "all rolls, records, writs, books, proceedings, decrees, warrants, accounts, papers and documents whatsoever of a public nature belonging to Her Majesty."<sup>116</sup>

The Ontario Court of Justice is a "court of record".<sup>117</sup> What is a court of record? In simple terms, it is a court in which the record of what has transpired is sufficient, by itself, to prove or disprove what has transpired in it. In the somewhat archaic language of Stephen's Commentaries,<sup>118</sup> it is a court,

... whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the record of the Court and are such high and supereminent authority that their truth is not to be called in question.

What this means is that there is a lot of paper accumulated in court files and court facilities over the years. It is both costly to deal with and to store.

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<sup>115</sup>P.H. Winfield, The Chief Sources of English Legal History, (Harvard University Press: Cambridge, 1925), at p. 104.

<sup>116</sup>*id.*, at p. 104, citing 1 & 2 Vict., c. 95, s. 20.

<sup>117</sup>The Courts of Justice Act, *supra*, note 96, sections 11 and 34.

<sup>118</sup>Vol. 3, p. 372; see also, Dixon v. MacKay (1902), 21 Man. R. 762; Re Winnipeg Charter; re Community of the Sisters of the Holy Names of Jesus and Mary, (1922) 68 D.L.R. 506.



### **The Court as Record Keeper**

The role of the Court as record keeper is reflected in the provisions of The Courts of Justice Act and the Rules of Civil Procedure.<sup>119</sup>

A study conducted for the London Regional Courts Administration office<sup>120</sup>, has projected that the cost of leasing space for the keeping and storage of Ontario's court files over a five year period will be \$43,500,000 -- \$8,700,000 each year! Clearly some assessment needs to be made of the types of documents, or records, that are being kept and some analysis made of the type of documents or records that need to be kept.

There appears to us to be opportunities in this area, given the high costs involved, to reduce expenses and to redirect the savings in more positive ways in order to improve the efficiency of the justice system.

Briefly, the procedure employed in the Court with respect to record keeping is as follows. All documents relating to an action are kept on file by the Court, in the court office where the proceeding is initially filed for a period of three to five years. They are recorded and inventoried in accordance with a *Records Retention Schedule*, which is maintained by directive of Management Board of Cabinet. The directive requires the Schedule to include a description of each document in the court file and the amount of space the court file physically occupies.

Following the three to five year period, court files are then transferred to the Record Centre of the Ministry of Government Services in Cooksville for 15 to 17 years (whichever is necessary to make a total retention period of 20 years). At the

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<sup>119</sup>The Courts of Justice Act, supra, note 96, sections 71, 79, 134(1), 137; The Rules of Civil Procedure, R.R.O. 1990, Regulation 194, Rules 4, 14.07 and 30.11.

<sup>120</sup>Record Management Storage Study, June 1994

end of 20 years, the files are archived pursuant to the provisions of the Archives Act, R.S.O. 1990 c. 27. Documents are not placed on microfiche until they are archived.

There is provision in The Courts of Justice Act, section 70, for the disposition of documents and other material no longer required, in accordance with the directions of the Deputy Attorney General. Those directions, however, are subject to the approval of the Chief Justices and Chief Judges of the various courts in the province. In the late 1980's, the then Chief Justice of Ontario directed the then Registrar that no court documents were to be destroyed. It would appear, then, that all court documents which survive the 20 year period are archived, and none are destroyed.

Lack of storage space is a particularly acute problem in the older Court Houses of Ontario. An increasing number of files are therefore finding their way to the Records Centre in Cooksville. Retrieval of those which remain open and active, and of those which may be required for other reasons, is a time-consuming, inefficient and costly process.

There are at least three questions which need to be addressed in this context:

1. What records, documents and materials *need* to be kept and stored, as Stephen's Commentaries say, "for a perpetual memorial and testimony" of the acts and judicial proceedings that have occurred, in order to satisfy the requirements of a court of record?
2. Are there other records, documents and materials which need to be kept after a file ceases to be active; and if so, for how long?
3. How should they be kept, i.e. in what manner should they be stored?

Aside from the possibilities of electronic storage of documents, much space is wasted in the storage of documents at the present time which need not be wasted.

Inactive files and other documents stored in Cooksville, we understand, are not placed on microfiche until they are archived; ie. they remain in boxes and file folders for somewhere between 15 and 17 years! Much could be saved by commencing the microfiche process earlier.

Electronic filing promises the greatest advances in the storage of documents, of course. We have dealt with that process in Chapter 18.1, Technology and Statistical Information.

Another example of an area in which efficiencies can be introduced, and which was raised repeatedly in our consultation process, deals with the process of "entering" judgments and orders of the Court. It is a cumbersome, paper-laden and staff intensive process. Rule 59.05 sets out the requirements for the entry and filing of orders and judgments. Firstly, the number of the entry book or microfilm in question must be noted on the bottom of the original. Secondly, the date of the insertion of the order or judgment in the entry book must be noted on the original. Thirdly, a copy of the original must be inserted into the entry book, or the original must be microfilmed. Fourthly, *an additional* copy of the order or judgment, as entered, must be filed in the court file in the office where the proceeding was commenced. Finally, if the order is one that relates in some way to an earlier order -- by affirming, reversing, setting aside, varying or amending the earlier order -- this entry process must be followed not only in the court office where the second order is made but also in the office where the original order was made!

Court staff repeatedly recommended to us that this entry process be eliminated as being too time-consuming and costly.

Orders are retained in the entry books even after files become inactive and are sent to storage -- even though the stored files contain a copy of the order. They are retained because of the difficulty in retrieving files once they have gone into

storage. Most requests for copies of an order or judgment, which would trigger a need for retrieval, come from individuals who have been divorced and who require a certified copy of their prior divorce judgment in order to obtain a marriage license for the subsequent marriage.

If file contents were reduced, and a more effective system of records management were put into place, the duplicate process of order entry could be eliminated without disturbing the Court's function as record keeper. Indeed, the Court's ability to function as record keeper would be more effectively preserved.

#### **RECOMMENDATION:**

**We recommend that a Working Group be established, as part of the Implementation Team, to review the role of the Court as record keeper and to make recommendations with respect to:**

- 1. The nature and type of court record that must be preserved;**
- 2. Time parameters for records that do not require perpetual preservation;**
- 3. The manner of storage of records that need to be kept; and,**
- 4. The manner in which documents which are not required to be kept should be destroyed.**

**The Working Group should be comprised of representatives from the Judiciary, Courts Administration, Government Archives and the Bar.**

## CHAPTER 16

### FOCUS ON FAMILY LAW

#### 16.1 The Consultation Process:

During the Consultation stage of the Review, a substantial number of the oral and written presentations concerned proceedings in the Family Law area. The Review was told frequently about the tragic consequences of the high cost -- monetarily and emotionally -- of family law proceedings; about the numerous motions; about the often poisonous nature of lengthy affidavit materials; about the uncertainty of hearing dates; and about the lack of a province-wide specialized Family Court.

#### **Delay:**

Many people described the process in Family Law as one of "hurry up and wait".

Because of the delays in getting to trial, the significance of pre-trial orders increases, particularly in matters relating to interim custody, interim access and interim support. Judges are cautious about making such orders on incomplete or urgently prepared materials or where there has been no opportunity for response. This leads to the making of "interim interim" orders i.e., orders which are only effective until another court date in the future. The result: further appearances, additional emotional strain, and more expense.

The number of motions in Family Law has increased by about 150%<sup>121</sup> in the last five years.

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<sup>121</sup> Ministry of the Attorney General, Program Development Branch, Court Statistics Annual Report, Fiscal Year 1993/1994; Report Number A-20, *supra*, note 65.



The failure of parties to provide full and complete disclosure, and the failure of the courts to enforce the principle of full disclosure, were observed to be serious contributing factors to the delay. Another factor cited was over-scheduling by lawyers which has produced court scheduling problems and further delays.

It should be noted, however, that in some cases delays can have a beneficial effect in family law proceedings. Members of families are often pulled by the emotional crisis of their relationship breakdown and all too frequently attempt to play out these underlying themes of their personal problems in the courts. They should be discouraged from doing this, rather than encouraged to do so through the exacerbating tensions of an overly adversarial, technical and costly process -- a process which, in the end, may be of little ultimate benefit to the parties.

**Cost:**

By far the most striking problem portrayed by members of the public is the very high cost of Family Law proceedings. Many people believe that Family Court is only for the very rich or the legally aided. Too many motions and too much paperwork involved in the voluminous affidavit material have contributed to this high cost.

Many judges and lawyers were quick to point out that the statutes affecting Family Law have had more amendments than in any other area of the law in recent years resulting in a dramatic increase in litigation and inconsistency and therefore cost.

Cost sanctions, on the other hand, are rarely imposed in family court proceedings and most people believed that they should be. Finally, a number of people suggested imposing disincentives in the system for setting down lengthy matters, or at least fees commensurate with the time needed to try a matter.



The scheduling of trials in family cases often leads to delay. In some jurisdictions, consecutive trials days are not available and a trial can be broken up over a number of months, or even in some cases, we were told, over a year. Lawyers reported that the broad range of judicial expertise in the Family Law leads to ineffective pretrials and the tendency to continue the case and shop for a trial judge.

### **Process:**

Another problem described in the consultation process was the inconsistency and lack of predictability in the Family Law process. This has led to a sense of unfairness about the system. It also has the effect of reducing the possibilities for early resolution, as the parties and their lawyers continue to search for the judge who, they hope, will make a favourable decision.

Many courts operate under different formal and informal practice directions. In some instances these practice directions have been issued by a local bench without sufficient consultation. The result is an increase in paperwork and in costs to clients and lawyers, and an impact on the work of the court staff. Counsel who conduct their practices close to the borders of more than one jurisdiction are frustrated by these varying practice directions and the manner in which they are communicated or not communicated.<sup>122</sup>

It became clear that very few jurisdictions have maintained local or regional Family Law committees which, among other issues, could be useful in anticipating the impact and benefit of proposed practice directions.

As indicated previously, motions in family law have increased dramatically. Some contents of affidavits attached to motion material were reported by members

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<sup>122</sup> All courts have now been advised that Practice Directions must come from the Office of the Chief Justice for General Division matters and the Chief Judge for Provincial Division matters.

of the public to be damaging forever. We were told on more than one occasion that perjury in these affidavits is rampant. Where there is little control imposed over the process, lawyers feel compelled to draft lengthy and all encompassing affidavits to ensure procedural advantages for the client and to avoid future liability. Concern and frustration were expressed about the number of allegations made in affidavits that were not capable of being substantiated in any way. Whether that is true or not, it is clearly a perception that exists, as does the perception that such perjury goes unpunished. Many clients wish to have their entire story put before the court at the earliest opportunity; sometimes it is felt necessary to tell the whole story in response to opposing material.

The general method of scheduling a large number of motions for the same date and time was said to lead to confusion, to increased cost, and to the fact that many matters are not reached and need to be adjourned. There is a tremendous waste in this process.

Lawyers were criticized for their drafting of lengthy, damaging, and sometimes unsupportable affidavit material. Clients in family law proceedings expressed concerns that their lawyers did not adequately explain to them the court process, the duty for ongoing disclosure and the alternatives to court. Concerns were expressed that recessionary times have led to lawyers who normally practice in other areas of the law taking on family cases when they are not sufficiently experienced or qualified to do so. Often their approach is more adversarial and technical than experienced family lawyers.

There was also concern expressed that some judges in the General Division do not like hearing family law cases and that this dislike for the subject was communicated to litigants along with inappropriate and personal comments. Judges in family law cases need training in alternate dispute resolution techniques and in pre-trial management. In some cases, people felt that judges wanted to avoid making

tough decisions so they adjourned the case and advised the parties to settle it themselves. Many judges were seen as reluctant and/or without the resources to enforce timeliness in the process and children's issues are not seen as a priority over property and money.

The isolation and the constant stress of dealing with family issues was seen as a contributing factor to inconsistency and burnout among judges specializing in the family law area.

The entire process in dealing with family law cases before the court was criticized for its delays and adversarial focus. There is a tremendous need for case management with local and case by case flexibility. In particular, parties want to be involved in the process and not excluded from meetings between lawyers and judges. All too frequently options other than court are not considered.

**Resources:**

There was unanimous support for providing resources in a manner that would be complementary to the court process. These resources could include supervised access, mediation, assessments, and different models of counselling. It was suggested to the Review by lawyers, court staff, and judges that these resources should be connected to the court system to ensure accessibility and accountability.

**Education:**

The issue of education for the public, the bar, the bench, and administrative staff was repeatedly stressed.

A review of school curriculum provided by the Ministry of Education indicates that very little education is provided in schools with respect to the roles and responsibilities in relationships, upon separation, and towards children. Locally, it is difficult to identify available resources which might provide a reasonable alternative

to the court process or to assist parties through the court process. It was suggested that registration of births and marriages should automatically lead to distribution of information about these rights and responsibilities. Professionals involved in the family court system need education in case management, alternate dispute resolution skills, and in their attitudes towards family law and family law clients.

### **Family Support Plan:**

Throughout the consultation process, many complaints were made regarding the inaccessibility and inaccuracy of the Family Support Plan (the "FSP"). Some jurisdictions report inconsistencies in support orders. The perceived ineffectiveness of FSP exacerbates the difficulties in the ongoing conflicts between the parties or revives conflicts that were considered resolved.

### **Legal Aid:**

Legal Aid was criticized for time-consuming and costly delays in issuing certificates and for funding frivolous actions. The introduction of settlement conferences being conducted by local legal aid directors was seen as very positive because it fills the gap in the resolution focus of the system but, because Legal Aid is funding the litigation of one or both sides in the conflict, it may be perceived as a conflict of interest. It was suggested that lawyers be able to obtain legal aid certificates in family law proceedings only if they have participated in specialized training. It was also suggested that certificates be withdrawn for clients who do not comply with disclosure and other timelines set by the court.

### **Northern Ontario:**

Northern Ontario has unique and significant problems in the area of family law.

The inadequacy of facilities was seen as an aggravating factor to what are already conflict-centred family proceedings. Lack of meeting rooms produces a

demeaning environment for the public who must gather together in small hallways with their lawyers, in some cases in close proximity to their alleged abusers.

Because of the tremendous distances that must be travelled in the North, and because of limited resources, the amount of court time is reduced. This leads to lengthy adjournments. Frequently, it leads to trials being spread over many months. These difficulties greatly contribute to the cost of family law proceedings, as well as to the perception of a lack of access to justice in the north, generally.

## **16.2 The Proposal: A Resolution Focused Process for Family Law**

The Family Law Group, which participated in our deliberations and which is referred to in Chapter 5 reviewed the responses from the bench, public, bar, and courts administration and endeavoured to devise a constructive series of suggestions. These suggestions were then translated into a proposal for a new process. The new process for family law matters is predicated on informed choice and predictability for the litigants. It combines the desirability of early education and advance consideration of costs and alternate dispute resolution with court information centres, a streamlined application form, and all of the features of case flow management.

### **a. Early Education:**

Early education in schools across the province, combined with information centres in libraries, public settings, and courthouses should be available to inform people about their rights and responsibilities in relationships and towards their children. This information could also automatically be mailed following birth, marriage and adoption registrations.

These same information centres should also provide information about resources when relationships break down. The location and cost of resources could be given. Except for consent orders, court proceedings would be viewed as a last resort or for use in exceptional circumstances.



**b. Early Screening:**

In each courthouse, an information service should be available to outline the details about court proceedings - what is required and what can be expected. It is hoped that information about local family law lawyers and alternate dispute resolution resources would also be available, stressing the value of the client and his or her needs. For cases involving children, information about the impact of parental separation and court proceedings would be available. Precedents for those who choose to represent themselves would be available.

We recommend that some of this information be contained in a video that could also be purchased by lawyers and community resources. Viewing of this video would become a mandatory pre-condition to entering the Family Law court process, with exceptions for emergency applications.

**RECOMMENDATION**

**We recommend that an information services video be prepared with respect to family law matters for distribution through community resource centres, shelters, legal aid clinics, the courts and law offices. We recommend that, except in emergency situations, it be mandatory for parties contemplating family law litigation to view the video prior to instituting court process.**

**c. Alternate Dispute Resolution Attempts:**

We propose changes to the original Notice of Application form used to start a family law proceeding. We propose that it includes a section in which the litigant will be asked to describe previous attempts to use alternative dispute resolution techniques, if these have been employed, or, if not, to explain why they are not appropriate. The litigant will also be asked to confirm that he or she has reviewed the video material described above or, in emergency circumstances, to commit to viewing the material within a reasonable timeframe.



**d. Early Judicial Intervention:**

Upon filing, the Application will be assigned to a case management judge and a return date set for approximately two weeks after the deadline for filing a Response. The Response form is to contain similar sections to those indicated above in the Application.

Part of the Application form is to include a sworn statement which will briefly outline the essential facts. An abbreviated financial statement, including all applicable financial information is to be attached.

Orders for unopposed matters will be made on the first return date, in a summary fashion i.e. without, necessarily, the full formalities of the usual process.

Early judicial intervention is planned to take place in most cases before the first motion. In this process, the parties and their counsel will both meet with the judge to determine the most efficient strategy for meeting the needs of each particular case.

**e. A Streamlined Process**

At the first session with the assigned judge, an overall objective case management regime will be imposed but individual case timelines will be set for full disclosure and the completion of any necessary assessments, evaluations, and appointments of counsel for children. At this early session, the issues will be narrowed, interim orders can be made, and if necessary a date and time set for any contested interim motions.

If a motion is to be scheduled, the timing for exchange of material and the issues to be dealt with in the material will be addressed in this first session. The Review recommends that consideration be given to developing a standard form of affidavit that would focus clients and their counsel on the relevant facts. A

comprehensive examination of the costs of the case and the costs to be fixed at any interim stage will be discussed. Offers to settle will be encouraged. To the extent possible, clients will be informed about and involved in the case planning and will be made aware of the costs. The philosophy about cost disincentives for delays or failures to provide ongoing timely disclosures will be explained. The objective is to have only one motion per issue. The use of motions by conference call or without argument will also be encouraged.

The early session will also provide a mechanism for screening out unmeritorious claims and dealing with variation applications.

There will be some cases which will require immediate hearings and which, therefore, need to escape entrapment in the normal mesh of interim interim and interlocutory proceedings and assessments. It is expected that the availability of early judicial intervention and a streamlined process will facilitate the identification of these situations at an early stage and allow them to be channelled in the direction of an early hearing.

**Trials:**

Despite a more resolution-focused process, it should also be a respected principle that trials will be needed in some cases. These will be set on fixed dates and if longer than one day is needed, then consecutive days will be scheduled.

**RECOMMENDATION**

**We recommend that an early session/evaluation process involving the early intervention of the judge and a streamlined process be adopted in the expanded unified family court sites.**

### **Caseflow Management Features:**

We propose that the division of the "pre-trial" concept into settlement conferences and trial management conferences, as outlined in the Management of Cases chapter of this Report, apply in family law matters as well. It is an approach that fits particularly well with family law issues, and, indeed, is one that has already been pioneered in a number of family law sites around the province. The assistance of case management co-ordinators and judicial support officers, as outlined in the previous chapter, would also apply, subject to the proviso that judicial support officers would not determine contested interim relief issues in Family Law.

### **Alternate Dispute Resolution Resources:**

The revised process stresses, through initial screening and diversion during the court proceedings, the importance of mediation and other dispute resolution options, where appropriate. The Review supports the availability of alternate dispute resolution facilities in family law matters, under judicial supervision, keeping in mind the importance of guarding against power imbalances which may exist between parties in such settings.

### **The Success of Collaboration and Communication:**

A commitment to education for lawyers and judges and administrative case managers is needed to create the specialty atmosphere required in family law. Most of those who responded to the review on family law issues assumed that the Unified Family Court in Hamilton was to be expanded province-wide through currently proposed amendments to the Courts of Justice Act. This was uniformly supported. The success of the UFC was lauded by all as an informing influence. As well, the success of the Family Case Management initiatives in the General Division and the Provincial Division (Central Court) in Toronto was viewed with great envy by those involved with courts in other jurisdictions.

The success of these initiatives has been dependant upon the communication and collaboration of court staff, lawyers and judges. It is imperative that court staff be heard, trained and informed on a regular basis. The proposed co-management approach of a professional team comprised of judge, judicial support officer, case management/ administrative person and connected dispute resolution services would draw upon the successful aspects of these initiatives and provide the necessary support.

It is equally important that public representatives be involved in further initiatives of this nature.

## **RECOMMENDATION**

**To enhance communication, knowledge, and the quality of the process in family law matters, we recommend that local and regional family law committees, with representatives from the public, the judiciary, courts administration and the bar, be established. A parallel provincial committee would assist in providing a communication and coordination function across the province.**

### **Technology:**

Special consideration should immediately be given to providing a full range of electronic, video, and tele-conferencing technology for Family Law matters, particularly in Northern Ontario. The existence of such technology would permit judges to have an increased presence in scattered and isolated communities without the parties, counsel, or the judges spending so much valuable time and money on travel.

**Our recommendation for a technology enhanced pilot project in Northern Ontario is included in Chapter 18.**

**Legal Aid:**

As we have noted, the Review heard a great deal of concern expressed during our consultation phase with respect to the number of inexperienced lawyers practicing in the field of family law.

**RECOMMENDATION**

**We therefore recommend that the legal aid plan consider the development of legal education programs for lawyers providing family law services, in conjunction with the Law Society of Upper Canada and other professional organizations; and that the granting of legal aid certificates to lawyers representing family law clients be contingent upon participation in such programs or upon some other form of accreditation.**

We understand that the Legal Aid Plan has recently adopted a policy respecting the granting of new legal aid certificates where there has been a change of solicitor by a client. Clients will be limited to one change of solicitor per case, in the absence of good reason for the change. We support this policy.

**Purely Uncontested Divorces:**

The Review was reminded by members of the public, the bar, and the bench of the high cost of uncontested divorces. This cost is directly attributable to filing fees, paper intensive documentation, and judicial involvement. In today's society respecting separation and divorce, there seems to be little basis for the continuation of such a resource intensive process in simple, straightforward uncontested cases.

**RECOMMENDATION**

**We recommend the development of administrative, low-cost options without judicial involvement for the disposition of purely uncontested divorces, (excluding issues respecting children).**



### **Family Support Plan:**

As indicated above, many concerns were expressed by the public, the bar, and court staff about the inaccessibility of the Family Support Plan. It is well-known that the high volume of cases cannot be supported by the current levels of staff and technology.

The paperwork involved is confusing and mistakes are easily made, but not easily corrected. Although the universality of the policy is commendable, neither the recipients nor the payors are satisfied with the level of client service. A significant portion of resources is directed at recovering payments from those who would pay in any event. The entire focus of the program seems to be on "collection" with little, if any, attention to facilitating the process of "enforcement".

We recognize that there are legitimate policy and political reasons lying behind the decision to make the FSP program universal and which are well beyond the mandate of this Review. Our consultations across the entire Province have made it plain to us, however, that there are very significant costs accompanying that decision, both from an administrative perspective *and* from the emotional perspective of those who are payors and payees in the system.

### **RECOMMENDATION**

**We recommend that serious consideration be given to removing from the Family Support Plan support payors who are in compliance, until there has been a default, and redirecting efforts and resources to customer service issues.**

### **The Outstanding Landscape Issue:**

The Government has decided that the Unified Family Court concept will be extended throughout Ontario. This process will take place in stages, over time.



One of the difficulties the system faces, then, is the parallel existence of three different kinds of "family law courts" in the Province while this process takes place over what could be a lengthy period. There will be the Unified Family Court concept in those areas where implementation has occurred, but family law matters will continue to be dealt with in the General Division and in the Provincial Division where it has not.

This is troublesome from all perspectives, but particularly from the public's point of view.

We propose that, pending our Final Report, the Family Law Group continue to advise the Review on implementation issues respecting the "New Process" that we have put forward, and with respect to issues relating to the prospective implementation of the Unified Family Court across the Province. These issues will be addressed further in the Final Report.

## CHAPTER 17.1

### SMALL CLAIMS COURT

#### Introduction

"Small claims" in Ontario refers to claims involving less than \$6,000. They are dealt with in a branch of the Ontario Court of Justice (General Division) called the Small Claims Court.<sup>123</sup>

Approximately 135,000 small claims are issued in Ontario yearly, as compared to approximately 178,000 civil proceedings begun in the other areas of the General Division.<sup>124</sup> Clearly, the disposition of small claims forms a very important part of the civil justice system. Along with family law and landlord and tenant matters, it is an area where people are touched most by the system.

We have heard a great deal about Small Claims Court during the course of our consultation phase. Almost uniformly, members of the public and the Bar have suggested that the monetary limit be raised from the current limit of \$6,000 to something in the range of \$10,000 or more. At the same time, though, many were concerned by the prospect of such an increase leading to more people requiring lawyers or paralegal agents to assist them, thereby affecting the "people's court" character of the institution.

Concerns were also expressed about the cost and complexity of appeals from decisions in Small Claims Court, and about inconsistencies in decisions arising from

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<sup>123</sup>See *The Courts of Justice Act*, *supra*, note 96, sections 22-33.

<sup>124</sup>See *Court Statistics Annual Report, Fiscal Year 1993-1994*, *supra*, note 65, pp. 9(replacement page) and 56.

the use of deputy judges instead of full-time judges for most Small Claims Court matters. The issue about whether small claims matters should be presided over by part-time deputy judges or by full-time judges is a difficult one because of the funding implications it contains.

We have concluded that we are not in a position, at this stage, to make definitive recommendations regarding the question of small claims. A study is being conducted by the fundamental issues group of the Review, and we are awaiting the results of that study before making our ultimate recommendations. In addition, the Simplified Rules proposal, which we have referred to earlier in this Report, may have an impact on how the disposition of small claims should be addressed in the province. We have recommended that the Simplified Rules initiative be adopted. We hope that by the time of our Final Report we will know whether it has been.

We do have some interim suggestions to make, however. In view of the importance of the subject and the considerable number of comments that we received, we propose to deal briefly with small claims at this time.

### **History and Background**

A court with jurisdiction for small claims can be traced back two centuries in Ontario.

Frequently referred to as the "people's court", today's Small Claims Court in Ontario is seen as the one place where a private citizen can have ready and inexpensive access to civil justice. The popular Ministry of the Attorney General booklet provides useful guidance and parties often represent themselves in proceedings.

Recently, the jurisdiction of the Small Claims Court was raised to \$6,000.00 across the province. While the increase has been favourably received, we have heard

reports, as noted above, that the increase has resulted in increased legal representation of litigants. It has also resulted in a greater formalization of the process and an increasing presence of business-related plaintiffs. Some centres report that trials take longer and delay -- the plague which envelops the rest of the civil justice system as well -- is now being spotted in this forum.

Ontario's Small Claims Court had its origins in the late 18th century. Shortly after Upper Canada was created in 1791, a court with jurisdiction for amounts less than 40 shillings was created.<sup>125</sup> It was called the *Court of Requests*, and was created to appease the emerging mercantile class who were crying out for a place to go to have debts quickly and cheaply enforced. Courts of Request were known popularly as "six-penny chanceries", and their adjudicators rendered a crude justice. However, the six-penny chanceries were quick, cheap, and a practical alternative to waiting for the infrequent visits of the Superior Court Judges or paying for the more expensive procedures of the higher courts.<sup>126</sup>

A more judicial arrangement than the "six-penny chanceries" was put in place for small claims following Confederation in 1867. Ontario, like Manitoba and Prince Edward Island, patterned its Small Claims Court procedure after its county and district courts. However, while Manitoba and Prince Edward Island used provincially-appointed magistrates to adjudicate, Ontario's Small Claims Courts were uniquely presided over primarily by County or District Court Judges and occasionally by a lawyers. These courts were known as Division Courts.

The Division Courts' jurisdiction steadily increased so that by 1967 it was \$400 in the counties and \$800 in the districts.

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<sup>125</sup>P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson Limited, Toronto, 1987) at 237 [hereinafter "Russell"].

<sup>126</sup>*id.*

### Changes to the Small Claims Courts from 1970-1987

In the 1970's a growing consumer rights movement drew attention to the necessity of having a forum for the resolution of "small disputes". In Ontario, the Division Courts' name was changed to the *Small Claims Court*, with the enactment of the Small Claims Court Act, R.S.O. 1970, c.439. This Act empowered the province to appoint full-time judges to hear disputes, but by 1973 only three had been appointed. The federally-appointed County and District Court Judges continued to adjudicate nominal small claims. However, the Small Claims Court Act provided that County and District Court Judges could appoint part-time deputy judges who had to be lawyers. Deputy judges began to do the "lion's share" of small claims adjudication in the province.<sup>127</sup>

By 1977 the jurisdiction of the Small Claims Court had increased to \$1,000.00.

However the Small Claims Court was severely criticized for its informal, lackadaisical process. There was also concern that the Small Claims Court was being predominantly used by creditors and businesses to collect debts. The province's reaction was to bring the Small Claims Court slowly into the formal structure of Ontario's courts.

In 1979, the Small Claims Court in Toronto became a division of the Provincial Court. Initially established on a 3-year trial basis, it was called the *Provincial Court (Civil Division)*, and was presided over by full-time, provincially appointed judges with the status and terms of office of Provincial Court Judges. The Court was continued on a permanent basis in 1982. It functioned only in Toronto and had the jurisdiction to try civil claims of up to \$3,000.00. Elsewhere in the province the small claims jurisdiction remained at the \$1,000.00 which had been prescribed in 1977.

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<sup>127</sup>Russell, *supra*, note 126, at p. 239.



In 1984, the Provincial Court (Civil Division) and the Small Claims Court were amalgamated under the revision of Ontario's Courts of Justice Act.<sup>128</sup> In 1985, all Small Claims Courts became Provincial Courts (Civil Division). The court in Toronto retained a jurisdiction of \$3,000.00 while the rest of the province remained at \$1,000.00. Deputy Judges could hear claims up to \$1,000.00. Only full-time Provincial Court Judges could hear claims between \$1,000.00 and \$3,000.00. By 1997, there were 13 full time Provincial Court (Civil Division) Judges across the province - 10 in Toronto, and one each in Ottawa, St. Catharines and Hamilton.<sup>129</sup> Otherwise, claims in the Provincial Court (Civil Division) could be heard by District Court Judges, Provincial Court Judges, or Deputy Judges.

### **The Small Claims Court Today**

In 1990, major changes were made to the structure of the courts in Ontario. The former High Court of Justice and the District Court were merged to create one superior trial court for the province, and the new Court was regionalized. These changes also affected the Small Claims Court, which became a branch of the General Division.

The former Provincial Court (Civil Division) which heard small claims matters was changed to the new *Small Claims Court*, pursuant to the Courts of Justice Act, s. 22. *Small Claims Court Rules*<sup>130</sup>, are prescribed by regulation pursuant to this Act.

It's jurisdiction, which is prescribed by regulation, is presently \$6,000.00 across

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<sup>128</sup>id., at p. 240.

<sup>129</sup>Zuber Report, *supra*, note 2, p. 35.

<sup>130</sup>R.R.O. 1990, Reg. 201, am. O. Reg. 732/92 (Dec. 7, 92).



the province.<sup>131</sup> The monetary jurisdiction may be increased with increases in the Consumer Price Index.<sup>132</sup>

The Small Claims Court consists of the Chief Justice of the Ontario Court of Justice, and such other General Division Judges as the Chief Justice may designate from time to time. All General Division Judges have jurisdiction to be Small Claims Court Judges.

Proceedings in the Small Claims Court are to be heard by a judge of the General Division. However, the legislation provides that a proceeding may also be heard and determined by a provincial judge assigned to the Provincial Court (Civil Division) "immediately before the 1st day of September, 1990" or by a deputy judge appointed under s.32.<sup>133</sup>

Parties may represent themselves in Small Claims Court proceedings, and frequently do. Alternatively, they may be represented by counsel or by an agent. The Small Claims Court has the jurisdiction to bar an agent, who is not a barrister and solicitor, from the proceedings if the court finds that the agent is not "properly" competent to represent the party, or if the agent at the hearing does not comply with the duties and responsibilities of an advocate (s.26).

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<sup>131</sup>O. Reg. 92/93, which came into force on April 1, 1993, provides as follows:

1. (1) The maximum amount of a claim in the Small Claims Court is \$6000.
- (2) The maximum amount of a claim over which a deputy judge may preside is \$6000.

Recall that previously the jurisdiction had been \$3000.00 in Toronto, and \$1000.00 in the rest of the Ontario regions.

<sup>132</sup>Ministry Comment, 1989 Amendments, Bill 2, in Watson and McGowan, ONTARIO CIVIL PRACTICE, Courts of Justice Act (Carswell: Toronto, 1994) at "PART 1: COURTS OF JUSTICE ACT" at p. 24.

<sup>133</sup>*The Courts of Justice Act*, *supra*, note 96, sections 24(1), 24(2) and 32.

Matters falling within the jurisdiction of the Small Claims Court, albeit involving amounts of less than \$6,000, are quite broad and varied. The Court has the power to hear and determine in a summary way all questions of law and fact, and may make such order as is considered "just and agreeable to good conscience". Proceedings are intended to be, and are, more informal than proceedings in the General Division. Small Claims Courts are not bound by the formal rules of evidence and (except for matters of privilege) are permitted to listen to and consider "any relevant oral testimony, documents or other thing".<sup>134</sup>

Unlike the General Division, the Small Claims Court may also make orders regarding the times and proportions of payments to be made by defendants. The Court may also award costs, although these costs are not to exceed 15% of the amount claimed or value of the property, unless the court considers it necessary in the interests of justice to penalize a party, counsel or agent for unreasonable behaviour in the proceeding.<sup>135</sup>

### **Pre-Trials or Settlement Conferences in Small Court Proceedings**

Pre-trials or settlement conferences may be conducted in Small Claims Court proceedings at the request of the parties, or by the direction of the Small Claims Court.<sup>136</sup> Pioneered in the Toronto Small Claims Court as part of a general "ADR" initiative, pre-trials are now conducted in most locations throughout Ontario, in an effort to facilitate settlements and, if settlement is not achieved, to streamline the issues before trial. In some locations, the pre-trial or settlement conference may take the form of a mediation session, and this combined pre-trial/mediation procedure has led to successful results.

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<sup>134</sup>*The Courts of Justice Act, supra*, note 96, section 27.

<sup>135</sup>*id.*, ss. 28 and 29.

<sup>136</sup>Small Claims Court Rules, Rule 14.01 (1).

There are inconsistencies in the way pre-trials or settlement conferences are conducted across the province, however. Some are conducted at a level of great sophistication. Others simply lead to a quick reference to trial. This inconsistency may be due to the fact that a pre-trial may be conducted by a judge, a deputy judge, a referee, or any person designated by the court;<sup>137</sup> but what it means is that the procedure does not always achieve the desired objectives of either settling the case or, if not, at least streamlining the issues for trial.

The public, and professionals like paralegal agents who advise the public with respect to small claims matters, have made it clear to us that they like the feature of pre-trials with a strong settlement element to them. Their interest in this feature is consistent with the successful results of the ADR initiatives, and with the result of similar procedures adopted recently in British Columbia in the Small Claims Court in that province.<sup>138</sup>

## RECOMMENDATION

**We recommend that Small Claims Court proceedings across the province incorporate a standardized settlement conference/pre-trial process, with mediation-like services available as a part of that process where feasible.**

### Deputy Judges

Lawyers may be appointed as deputy judges to preside over Small Claims Court proceedings. Section 32 of the Courts of Justice Act provides that a Regional Senior Justice of the General Division, with the approval of the Attorney General, may appoint a barrister and solicitor to act as a deputy judge of the Small Claims Court for a three-year renewable term. A deputy judge may not preside over

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<sup>137</sup>Rule 14.01(2) provides that a pre-trial may be held before a "judge or another person designated by the court", at the court's direction.

<sup>138</sup>Semmens: Adams, Evaluation of the Small Claims Program Province of British Columbia, Ministry of the Attorney General (December, 1992) at 30.

proceedings which are in excess of the amount prescribed regarding deputy judges by regulation, or for proceedings for the recovery of possession of personal property exceeding the prescribed amount. Deputy judges can hear pre-trials and preside over trials.

There are approximately 800 deputy judges in Ontario. They are dedicated members of the Bar who virtually volunteer their time to perform these duties. They now form the principle adjudicators in Small Claims Court matters, as the number of full time judges has been reduced to five -- three in Toronto, one in Ottawa and one in St. Catherines.

One criticism of the plan which utilizes deputy judges as the principal adjudicators in the Small Claims Court across the province has been that their presence contributes to an inconsistency of judgments. This may be partly explained by the fact that they are "volunteers" in essence,<sup>139</sup> leaving their practices for the day when they are sitting as small claims judges, and have neither the continued experience of being a judge nor any training for their role as part time deputy judges. We believe that training is important. To ensure that there is standardization in the hearings of Small Claims Court matters, and to account for the fact that deputy judges do not share the adjudicative background of General Division Judges, we recommend that training be provided for them.

#### **RECOMMENDATION:**

**We recommend that lawyers who act as Deputy Small Claims Court Judges receive mandatory training for the performance of their duties, under the direction of the committee of the General Division Judges in consultation with the National Judicial Centre. We also recommend that this training include training in mediation. We**

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<sup>139</sup>Deputy Small Claims Court judges are paid a nominal rate of \$235 per day, an amount which is less than the hourly rate of many at their level of experience in the profession.

**further recommend that Deputy Judges be compensated, at their per diem rate, while attending such training sessions.**

### **Appeal Procedures in Small Claims Court Actions**

At present, appeals from decisions of the Small Claims Court may be where the final order for payment of money or possession of personal property exceeds the amount or equivalent value of \$500.00.

We heard numerous submissions that the appeal process is laden with unnecessary complexities. Appeals go to a branch of the Ontario Court (General Division) called the Divisional Court. The Divisional Court hears appeals from and reviews decisions of administrative tribunals, and it has appellate jurisdiction in civil matters involving amounts up to \$25,000, including small claims.

The appeal procedure is complex, paper-laden and costly. Moreover, it is not easily understood by laypeople. It is not -- to use a computer language analogy -- a "user friendly" environment for small claims litigants, many of whom are not represented by lawyers (They may not be represented by paralegal agents at the appellate level).

Another factor militating against easy and quick access for small claims litigants to the appeal process is that, while the Divisional Court sits regularly on an ongoing basis in Toronto, it does not do so in the other Regions of the province.

There appears to us to be no clear reason to keep Small Claims Court appeals in the Divisional Court, especially in view of the fact that all General Division Judges are also Judges of the Divisional Court.



**RECOMMENDATION:**

We recommend that the *Courts of Justice Act* be amended to provide for appeals from decisions of the Small Claims Court to be made to a single Judge of the Ontario Court of Justice (General Division) sitting in the Region where the claim has been disposed of.

At the present time, appeals may be taken from decisions of the Small Claims Court where the final order for payment or possession of personal property exceeds the amount or equivalent value of \$500.<sup>140</sup> We have been advised that the number of appeals has more than doubled since the increase in jurisdiction of the Small Claims Court to \$6,000.

We believe that the \$500 threshold for appeals in these matters is too low, and that it should be adjusted upward to \$1,200 as long as the monetary limit of the Small Claims Court jurisdiction remains at \$6,000. Moreover, we suggest that the appeal threshold should be adjusted automatically whenever there is an adjustment in the monetary level of the Small Claims Court jurisdiction. Given that the Court's jurisdiction is limited by a constitutional ceiling -- undefined, but thought to be somewhere between approximately \$20,000 and \$25,000 -- we suggest the adjustment factor be fixed at 20%.

**RECOMMENDATION:**

We recommend that the monetary threshold for appeals from final orders in Small Claims Court be established at \$1,200 for the present, and that the threshold be established automatically at 20% of the maximum monetary jurisdiction of the Small Claims Court, as it may be prescribed by regulation from time to time.

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<sup>140</sup>*The Courts of Justice Act*, *supra*, note 96, s.31



Finally, we believe that consideration should be given to providing the option for written appeals in appropriate cases. As we have noted, many litigants in Small Claims Court matters are representing themselves. It is, after all, the "peoples' court". They do not encounter the same level of assistance in launching unrepresented appeals to the Divisional Court as they receive when launching their initial claim in the Small Claims Court. Conversely, staff at the Divisional Court office are asked to provide assistance which they are not equipped to, and cannot, provide. Many people confuse their right to appeal with the right to try the case over again. These problems contribute to delay, cost, confusion, misunderstanding and frustration with the system.

Much could be avoided if certain appeals, at least, could be disposed of on the basis of the written record and argument. If this option is to be adopted, however, it is important that information materials, in plain language that can be understood by laypeople, be made available to the public to explain to them the procedures -- and the limits -- of the appeal process.

#### **RECOMMENDATION:**

**We recommend that consideration be given to establishing an optional procedure for appeals to be presented only in writing from final orders of the Small Claims Court.**

Written appeals could be completed by parties who are representing themselves, and filed or mailed to the court. This would eliminate complexity for appellants who are unfamiliar with the present Divisional Court procedure. A single Ontario Court (General Division) Judge could hear the appeal, and his or her judgment could be mailed to the parties. This would foster the expeditious disposal of appeals.

**Towards the Final Report**

There are many issues respecting the Small Claims Court that we have not been able to address in this First Report. We will be returning to these issues in our Final Report.

The British Columbia experience with a dedicated Small Claims Court presided over by full time provincially appointed judges, bears examination. The funding implications for such a court are significant for the Provincial Government, however. We expect to be in a better position to sort these issues out, and to make further recommendations, after we have received, and been able to assess, the study on Small Claims Courts which is presently being conducted under the auspices of the Review's fundamental issues group.

## CHAPTER 17.2

### LANDLORD AND TENANT MATTERS

Landlord and tenant applications are placing significant pressure on the Ontario Court of Justice (General Division). In addition, the public -- both landlords and tenants -- appear to find the procedure unwieldy, too lengthy, and difficult to understand.

In 1993/94 there were 40,068 landlord and tenant applications commenced in Ontario. This represents a steady increase of 34% from the 29,818 applications filed in 1989/90.<sup>142</sup>

Landlord and tenant matters are a specialized area governed by the Landlord and Tenant Act 1990. Pursuant to this Act, disputed applications are to be resolved by a judge. There is *no other recourse* for disputed applications. *Undisputed* applications and default judgments may be summarily disposed of by the registrar. The majority of all applications are brought by landlords for arrears of rent.

The disputed applications, those which must go to the courts for resolution, have become problematic. A recent study partly funded by the Ministry of Housing and prepared by Dr. Julie Macfarlane<sup>143</sup> examined landlord and tenant disputes in Ontario. The Macfarlane Study reported that 95% of cases are landlord initiated applications for arrears of rent. In a sample of 400 cases, only 6% went to trial. In

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<sup>142</sup>Court Statistics Annual Report, published in October, 1994, *supra*, note 65.

<sup>143</sup> Julie Macfarlane, Project Coordinator, THE LANDLORD/TENANT DISPUTE RESOLUTION PROJECT: FINAL REPORT AND RECOMMENDATIONS, May, 1994, [hereinafter "Macfarlane Study"].

Toronto the percentage was significantly higher, at 17%.<sup>144</sup> Low dispute rates are generally the result of non-attendance of tenants.

Although the numbers of 6% or 17% regarding referral to trial are not dramatically large numbers, their significance lies in the fact that General Division judges are encumbered with deciding the relatively uncomplicated issue of "arrear of rent". These numbers become more significant when coupled with the fact that the number of applications has increased 34% in the last five years. The Macfarlane Study also reports that tenants are increasingly defending their positions, implicitly increasing the number of disputed resolutions which will be before the courts. Additionally, the efforts of the Ministry of Housing -- which deals with rent increases -- are often duplicated when an increase is approved, a tenant falls into arrears, and the whole matter is re-enacted before a General Division judge.

While a judge is necessary to deal with the purely legal and more complex issues in landlord and tenant disputes, the majority of straightforward rental arrears matters could possibly be resolved in another forum. A new forum would have the added advantage of assisting tenants who, according to the Macfarlane Study, have found the process under the Landlord and Tenant Act confusing. Tenants have reported that they are not knowledgeable about their legal rights, have limited access to legal representation, and ultimately feel powerless. Furthermore, although the statute was drafted with the intention to provide clear adjudicative recourse to tenants, this recourse is being used primarily by landlords, who bring 95% of applications. Additionally, the Macfarlane Study reports that both landlords and tenants find the current statutory procedure for bringing applications to be highly legalistic and "dauntingly complex".

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<sup>144</sup> Registrars who find, or detect, that an application is in dispute reportedly refer these applications to trial. Thus the variation among court house registrars in defining "**dispute**" is a significant variable in the percentages of applications referred to court.

A new forum, then, could be ideal for providing simplified procedures to benefit tenants and landlords, while simultaneously diverting the relatively simple and non-legalistic matters away from the court.

The logical alternative to the courts is an administrative tribunal. In addition to resolution of disputes, an administrative tribunal might also offer mediation services.

The Macfarlane Study considered mediation before trial. Mediation is touted as an intrinsically clearer procedure which consequently promotes accessibility and which has already been practised with success in some parts of Ontario. Where there is an interest in maintaining a relationship between the parties -- such as is the case in many landlord and tenant matters -- mediation has been demonstrated to be a more effective method of dispute resolution.

Unfortunately, from the perspective of this analysis, there are constitutional difficulties with the administrative tribunal option. Earlier attempts in the province to establish such an option, through the rent review process, were struck down both in the Ontario Court of Appeal and in the Supreme Court of Canada.<sup>145</sup> Other provinces have had similar experiences. In some provinces, -- Quebec, for instance - - such tribunals have been approved as being within the constitutional powers of the province. At present the issue is once again before the Supreme Court of Canada for consideration.

The constitutional issue is essentially one of whether the province can delegate this function, which has been carried out in the past by federally appointed judges, to a provincially appointed tribunal. Matters which were within the jurisdiction of federally appointed judges at the time of Confederation cannot be delegated,

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<sup>145</sup> Re Residential Tenancies Act, (1980) 26 O.R. (2d) 609(C.A.); [1981] 1 S.C.R. 714 (S.C.C.).



pursuant to s.96 of the Constitution Act, 1867. Exceptions may be made in circumstances where the powers being exercised are "administrative" rather than "judicial", or where the power in question is one in which the "judicial" function is merely ancillary function. This preserves the integrity of the courts presided over by s.96 judges.

Ontario's previous attempts to create a landlord and tenant tribunal were held to be unconstitutional because: (1) landlord and tenant matters were within the jurisdiction of s.96 judges at the time of Confederation; (2) an administrative tribunal created to hear such disputes would have a "judicial" function; and (3) this "judicial" function would be the primary function of such a tribunal.<sup>146</sup>

However, two other Supreme Court of Canada decisions suggest that an administrative tribunal for landlord and tenant matters may be constitutional. First, in 1983, the Supreme Court of Canada<sup>147</sup> held that landlord and tenant matters were not within the exclusive jurisdiction of s.96 judges in Quebec, and found that a Quebec administrative tribunal created to deal with landlord and tenant disputes was constitutionally permissible. The decision regarding Quebec is at odds with the decision regarding Ontario. A 1989 decision offers a solution to such competing results. In 1989, the Supreme Court of Canada held <sup>148</sup> that in order to preserve uniformity across the country, it is necessary to consider whether the impugned power was within the exclusive jurisdiction of s.96 courts in *all* of the provinces which existed at the time of Confederation; i.e. Ontario, Quebec, New Brunswick and Nova Scotia. If there is a tie, then one must look to the jurisdiction of England's courts at the time of Confederation for the tie-breaker.

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<sup>146</sup>*id.*

<sup>147</sup>A.G. v. Grondin, [1983] 2 S.C.R. 62.

<sup>148</sup>Sobeys Stores Ltd. v. Yeomans, [1989] 1 S.C.R. 238.



At the present time, the score is 1-1 (Ontario and Quebec). An appeal is now pending before the Supreme Court of Canada from a decision of the Nova Scotia Court of Appeal, which found that an administrative tribunal with powers of mediation and arbitration over landlord and tenant matters was unconstitutional for similar reasons to that in the Ontario case. The Supreme Court, hopefully, will now decide the issue for all of Canada.

Until it does so, and unless its decision alters the current law in Ontario, administrative tribunals for landlord and tenant matters will not be an option in this province.

There is another option which could be considered.

A submission was made to the Task Force at its hearings in Ottawa that, if implemented, could create a new process for the resolution of these claims. Under this scheme, a complaint would be filed with an office of the Ministry of Housing and an Information Officer would attempt to mediate the dispute. If the mediation were unsuccessful, the matter would be referred immediately to a hearings officer who would make a determination and issue a report with recommendations. A party who did not accept the report would be entitled to file an application to the court for a hearing before the judge.

This scheme would avoid the constitutional pitfalls referred to above, because it leaves open the option of going to court if a satisfactory settlement cannot be reached. It does not empower any provincially-delegated authority to make any order customarily made by a federally appointed judge.

In our view, this option should be examined further.

The Task Force is informed that the Ministry of the Attorney General has recently met with Ministry of Housing officials to discuss what options of this nature would be viable.

**RECOMMENDATION:**

**We therefore recommend that the Ministry of the Attorney General continue to pursue mediation options with the Ministry of Housing.**

**If the Supreme Court of Canada holds that it is constitutionally permissible to place landlord and tenant disputes in an administrative setting, we recommend that such an option for Ontario be re-examined.**

Another possible option is to attempt to expand the utilization of the Court's power to direct references, under the Rules of Civil Procedure.<sup>149</sup> At present, those powers are limited, in terms of available options for landlord and tenant matters. A judge may, at any time in a proceeding, however, direct a reference to determine an issue relating to "the taking of accounts". Arguably, this is broad enough to include disputes over the quantum and arrears of rent. References may be directed to Masters of the Court or to a person agreed on by the parties. Consideration could be given to amending the statutory and regulatory framework regarding references to add a "landlord and tenant officer" as a potential referee and to provide for references to that person for simple factual landlord and tenant matters. The landlord and tenant officer would issue a "report", which could be deemed to be confirmed by the judge unless an appeal is taken from it -- which is presently the case for other reference matters -- thus preserving the "judicial element" in the process. Judges would still be required to make orders for repossession of property and to issue writs of possession.

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<sup>149</sup>Rule 54.

## CHAPTER 17.3

### CONSTRUCTION LIENS

Construction litigation in Ontario is based on the Construction Lien Act, RSO 1990 c.30 as amended S.O. 1994, c.27 and is extremely complex and technical in nature. This is due to the technical nature of construction contracts themselves, the technicalities of the construction process and the engineering issues that generally arise in a construction matter.

According to available statistics, the number of Construction Lien cases pending before the court has been increasing steadily over the past five years; from 317 cases pending in 1989/90 to 986 cases in 1993/94 - an over 200% increase.<sup>149</sup>

The Construction Lien Section of the Canadian Bar Association - Ontario,<sup>150</sup> has identified the construction industry as the province's second largest industry.

In that industry, contractors and subcontractors who supply services and materials to the primary contractors are concerned with the flow of funds from the owner down through the chain of contractors, subcontractors and suppliers as construction proceeds. The legislative scheme sets up a system of lien and holdback rights and trust provisions to ensure the payment for the services and materials supplied. These liens are registered against the title to the land in question. As pointed out in the CBAO submission:<sup>151</sup>

The Construction Lien Act is intended to provide the persons at the bottom of the "pyramid", those upon whose credit construction proceeds, with some collateral security against the ever-present risk of non-payment.

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<sup>149</sup>Court Statistics Annual Report Fiscal Year 1993/94, *supra*, note 65.

<sup>150</sup>Submission to The Civil Justice Review Re: Review of the Civil Justice System by the Construction Law Section as Relates to Construction Issues, Canadian Bar Association - Ontario, July 20, 1994.

<sup>151</sup> *Id.*, p.4

Traditionally, smaller contractors, subcontractors, and tradesmen, have not been capitalised to the extent that they are able to sustain significant losses and continue in business. Accordingly, the insolvency of a contractor, or a major subcontractor, can impact on those further down the payment "pyramid" of a project, causing multiple insolvencies. Any significant interruption in tight cash-flows can cause business failures. As well, it is accepted that the timing of the receipt of funds can mean the difference between survival and failure.<sup>152</sup>

In addition to lien rights , the statute creates a scheme of payments and "holdbacks" as the project proceeds. These "holdbacks" accumulate and become a fund which is then a source of recovery in the event that someone is not paid.

Any dispute between an owner and subcontractor with regard to the work to be performed could interrupt the flow of payments. The presence of liens will stop payments from the owner to the general contractor placing the entire flow of payment along the chain into jeopardy. A single lien can stop a multi million dollar project. The Act allows a lien to be set aside by posting security with the court. Accordingly, it is critical that there be quick access to the courts and to resolve lien disputes in order to keep the construction project moving.

The complex and technical nature of the legislation mirrors the highly specialized nature of construction contracts. When these disputes must be dealt with by the courts, vast amounts of documents are the norm and multiple parties are involved. Most contracts utilize standard forms prepared by the Canadian Construction Documents Committee.

In Ontario, lien matters have been dealt with by Masters in Toronto and Windsor and by General Division Judges elsewhere. The Construction Lien Act

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<sup>152</sup>id.

formerly provided that the Masters jurisdiction was limited to lien matters relating to land in their own counties or districts. That limitation was removed and Toronto Masters can now hear motions with respect to construction liens on land anywhere in the province. Since counsel with expertise in this area are generally based in Toronto, there has been a tremendous increase in the number of motions being heard by Toronto Masters. This has an impact on their availability for the trials of construction lien matters.

Masters derive their authority to deal with these matters from the legislation. The procedure is known as a reference or referral to the Master from a Judge. The CBAO Construction Law section has emphasized, in their submission to the Review, the effectiveness of the Lien Masters in Toronto. They have urged the retention of Masters to deal with these matters and an expansion of the " Lien Master " system across the province.

In 1994, the Ministry of the Attorney General established The Attorney General's Advisory Committee on Alternative Resolution of Construction Disputes. That group released a discussion paper in November of 1994 and will be releasing a final report in the near future.

The discussion paper recommends ADR clauses in construction contracts and also recommends that the reference powers under the Rules of Civil Procedure be expanded to allow references to someone other than a Master, i.e. to an outside technical expert.

A new form of contract was published in June of 1994 and provided for on site mediation and for arbitration of some disputes but it will take some time to find out if owners will use it.



The Construction Lien Act was amended in December of 1994 to allow references to be conducted "by a Master or a person agreed by the parties".<sup>153</sup> Where matters in dispute are more of technical nature instead of legal, these could be decided, on consent, by a person with the particular technical expertise. Once again, the amendments are too recent to evaluate their effectiveness.

The prompt resolution of construction dispute is important to the provincial economy. The Review looks forward with anticipation to the release of the Advisory Group's final report.

#### **RECOMMENDATION:**

**The Review recommends that a working group consisting of representatives of the Judiciary, the Masters, the Ministry of the Attorney General, the Construction Bar and the Construction Industry be established to review the final report of the Advisory Committee and report back to the Review for a recommendation in our Final Report.**

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<sup>153</sup>Bill 175, S.O. 1994, c.27, s.42(4).



## CHAPTER 17.4

### BANKRUPTCY

Bankruptcy matters are governed by Federal legislation<sup>155</sup>.

There are Bankruptcy Courts in four centres only; Toronto, London, Ottawa and Sudbury. The Registrar in Bankruptcy is in Toronto, and there are Deputy Registrars in Sudbury, Ottawa and London. Masters perform these duties in Toronto and Ottawa. In Sudbury, these duties are assumed by the Regional Senior General Division Judge. The Deputy Registrar position in London was vacant but has recently been filled on a temporary basis.

In a submission to the Review, The Canadian Bar Association - Ontario Branch supported the continued assignment of Masters to deal with these matters.

At this time, the Review does not have a clear assessment of the volumes of these matters nor of their impact on the Court. Contested and unopposed applications for Discharge involving individuals are dealt with in one of these four centres. As a result, individuals must travel across the province, and sometimes from considerable distances, to deal with matters in connection with these discharges and consequently, a disproportionate volume of work is directed to the Registrar and Deputy Registrars and the Judiciary in those courts.

In 1992, the legislation was amended with respect to consumer bankruptcies. Now where a consumer bankruptcy is unopposed, the bankrupt is discharged automatically after nine months from the date of the assignment. While this has had an impact by reducing the number of applications for discharge by consumer bankrupts, the Review was advised that this decline has been more than offset by the

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<sup>155</sup> The Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 .

increase in the number of commercial bankruptcies as a result of the economic difficulties of the past few years.

Should the team concept of case management as recommended by this report be adopted, the assignment of the bankruptcy matters could be made to the Judicial Support Officer associated with the commercial law team. It may also be possible to redirect the discharge functions to other areas and limit some of the impact on the four current bankruptcy centres.

**RECOMMENDATION:**

**The Review recommends that the Registrar and Deputy Registrar in Bankruptcy functions be assigned to the Judicial Support Officers working within the case management team concept, and that a Judicial Support Officer in each Regional Centre be appointed, under the *Bankruptcy and Insolvency Act*, to carry out the functions of a Deputy Registrar in Bankruptcy in each of those centres.**

## CHAPTER 18

### TECHNOLOGY

*For I dipt into the future,  
far as human eye could see,  
Saw the vision of the world,  
and all the wonder that would be."* <sup>156</sup>

*"Technology for the sake of technology is useless, dumb and potentially dangerous."*

*But,*

*"Justice is not absent just because there is technology".* <sup>157</sup>

#### 18.1 INTRODUCTION

Throughout our travels during the course of the Review, another consistent theme emerged. That theme was the need to modernize our justice system. We can no longer accept outdated approaches to conducting business with the advent of the "information age". We have not even scratched the surface of the technology potentials available to the courts and its users.

The implementation of modern computer, electronic, telephonic and video technology -- "multi-media technology, it might be called -- is crucial to the creation of a viable civil justice system. It will provide the structural foundation upon which the timely, manageable, cost-effective and streamlined delivery of services to the public can be designed and built. The changes proposed by our recommendations will not be achievable or affordable without maximizing the efficiencies which technology can create.

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<sup>156</sup>Alfred Lord Tennyson.

<sup>157</sup>Professor F. Lederer, Cancellor Professor of Law at the Marshall-Wythe School of Law, College of William and Mary, Virginia, and Director of Courtroom 21, "The Courtroom of the 21st Century Today" at Williamsburg, Virginia.

There is a certain mystique surrounding "technology", of course, coupled with a certain hyperbole on the one hand and a certain skepticism on the other. These attitudes are fed by ignorance (or at least by misunderstanding), by over-enthusiasm, by fear of the new and unknown, and by concerns about costs and loss of the "human" face of justice. Ignorance and misunderstanding -- and the misgivings which grow out of them -- can be overcome with experience and knowledge, however, and over-enthusiasm can be tempered by reality.

Technology should not be introduced simply for "technology's sake", to be sure. However, the benefits which technology offers for the civil justice system, both in the form of long term savings and in the form of better service, far outweigh the initial costs and effort which accompany its introduction. Technology is a tool to make the system work more effectively. It is a means to an end, not an end in itself.

Between the two extremes of technology simply for the sake of technology, and no technology, lies the path to a more streamlined, and improved infrastructure for the civil justice system of the late 20th and the 21st century. While Ontario's justice system has taken a few tentative steps along such a path, at present, it seems that there is neither a firm direction in place nor an ultimate destination in mind. Most of the trail remains to be blazed.

## **18.2 THE CURRENT SITUATION**

### **(a) The Technology Landscape**

Presently the employment of modern automation technology in the civil justice system across Ontario is in its infancy. It is scattered and uncoordinated at best; non-existent or dysfunctional at worst.

As a Report to the Senior Management Committee of the Ministry of the Attorney put it, in July 1994:<sup>158</sup>

"... the Ministry operates in a decentralized environment with respect to technology. Divisions have managed non-corporate technology [i.e. the large systems such as ICON] in terms of expenditures, development, priorities, etc. which has resulted in disparate levels of expertise among the Divisions, modest levels of automation and uneven distribution and application of technology."

There exists no functioning management information system to generate reliable and accurate statistical data for analysis, research and management purposes -- something which is critical for a smooth, streamlined and effectively-run system.

There exists no co-ordinated, inter-connected and compatible technology infrastructure to support the management and processing of cases through the system; or to support the work of administrators and judges in carrying out their functions as a part of that process. To the extent that there is a technology base, it is to be found in a myriad of hardware and software configurations with no single platform or system of design.

Paper is everywhere. It is handled, re-handled, and handled again. The process is then repeated. And repeated again. In sheer volume alone, all of this paper has a numbing effect on the system. It hampers the ability of administrators, judges and lawyers to cope with the workload in a timely and cost-effective manner. Information only on paper is hugely expensive and inefficient to record, to monitor, to retrieve, to move about in courthouses and between courthouses around the province and, finally, to store.

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<sup>158</sup>Information Technology Integration Project Report to the Senior Management Committee of the Ministry of the Attorney General, July 1994

The current court process is highly labour intensive. It relies mostly on manually driven processes and procedures. This results in costly, slow and unstimulating employment for a workforce that needs, and wants, to be challenged with more purposeful participation in the justice system.

To date, a classic error in the introduction of technology has been made. Initiatives which *have* been taken to introduce computer and electronic technology into the civil justice system, have frequently concentrated on efforts to automate these manual functions, without attempting to re-think what the system needs to do and how those requirements can be met in a more streamlined fashion. This approach to technology is almost as self-defeating as the proliferation of non-compatible and unconnected computer systems across the Province. It results in the perpetuation of unnecessary tasks -- a sort of built-in capacity to do the wrong things faster!. Contemporary advice makes it clear that the process needs to be re-thought before it is automated.

Finally, the members of the public are inconvenienced by all of this. Access to information is cumbersome and costly. What can be obtained over the telephone is limited by the nature of that medium, and, while court administrators do their best to co-operate, the volume of requests in some areas is such that counsel and the public may have difficulty getting through. A visit to the court office is time consuming, and, if it cannot be done personally, involves the expense of retaining a lawyer or agent. Attendances for filing documents form a significant part of the disbursements charged to a client in most litigious matters.

There are verified stories of law clerks lining up as early as 6 o'clock in the morning at courthouses to preserve a position that will enable them to do their day's work of filing and obtaining information before the day is finished!



**b) Document Processing and Flow Procedures**

The methods of processing documentation and the information contained in that documentation in today's civil justice system, and the flow procedures relating to them, can be summarized in the following broad functional categories:

- Inquiry
- Receipt
- Recording
- Filing
- Information Distribution
- Enforcement
- Financial Management
- Scheduling
- Administrative Management
- Storage

Each of these functions is performed in various ways across the Province, but for the most part, as noted -- and except in the three case management pilot project centres -- they are performed manually at the present time.

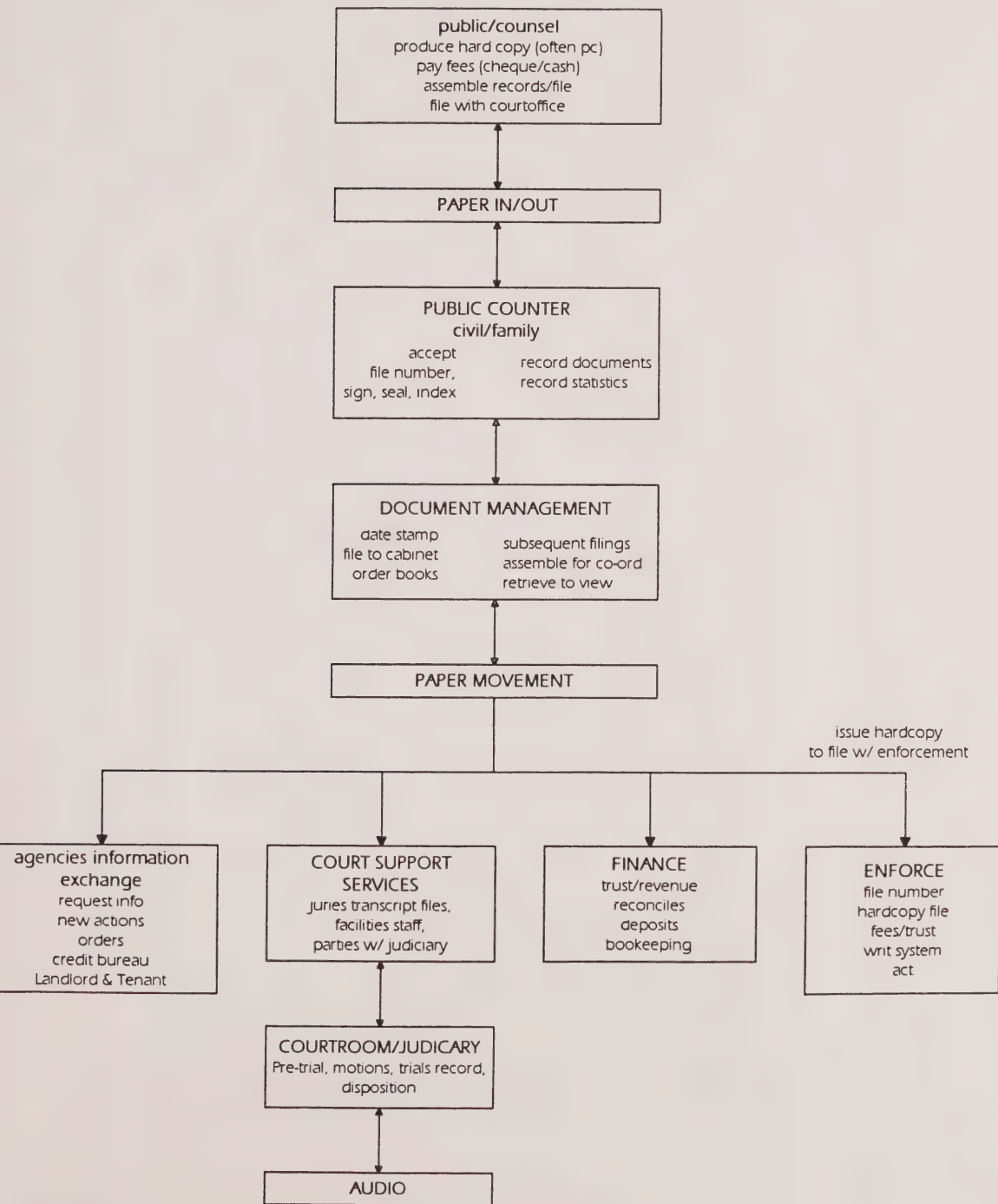
Charts 1 and 2 depict:

- a) the manual process, and
- b) an analysis of paper handling and storage costs for one Court centre (London, Ontario). It is designed to give some indication of the dimension and extent of these costs.

# ONTARIO'S CIVIL JUSTICE SYSTEM

Chart I

## MANUAL CASE PROCESSING



RECORD MANAGEMENT STORAGE STUDY		Page 1
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**ON SITE RECORDS RETENTION COST  
(USING LONDON COURTHOUSE AS A TEST SITE)**

A.	Space allocated for Records Retention office areas	1	1,551.91 sq. ft.
B.	Space allocated for Records Retention Storage Rooms	2	7,288.00 sq. ft.
C.	Lease costs per year	3	\$25.00 sq./ft./year
D.	Annual Lease Cost attributed to Records Retention (1x2)	4	\$220,997.75
E.	Volume of Records stored in the London Courthouse	5	9,500 cu ft.
F.	Annual Case Load (1993 London Courthouse Figures)	6	122,187
G.	Each Case produces (4 - 5)		.07 sq. ft.
H.	Courthouse Lease Cost/Caseload Comparison		
<u>Lease Cost</u>			
	50.00/sq. ft. x .07 x 1 case	7	\$35.00 per yr
	25.00/sq. ft. x .07 x 1 case	8	\$17.50 per yr
	15.00/sq. ft. x .07 x 1 case	9	\$10.50 per yr

**COST TO STORE LONDON COURTHOUSE RECORDS  
IN THE RECORD CENTRE (MISSISSAUGA)**

<b>A.</b>	Number of cu ft. of Records forwarded to the Record Centre annually	<sup>1</sup> 480 cu ft.
<b>B.</b>	<p>Cost to ship files to Record Centre</p> <p>500 pages/cu ft. @ \$4.25</p> <p>50 file folders @ \$15.00</p> <p>50 labels @ \$0.75</p> <p>1 carton box @ \$3.00</p> <p>Total materials @ \$23.00</p> <p>Transport @ \$5.00</p> <p>Packing &amp; Process @ \$16.00</p> <p>Total Cost \$44.00<sup>2</sup></p>	<sup>2</sup> \$44.00
<b>C.</b>	<p>Annual cost to ship files to the Record Centre (first year)</p> <p>480 cu ft.<sup>1</sup> x \$44.00<sup>2</sup> =</p>	<sup>3</sup> \$21,120.00
<b>D.</b>	Number of years files are stored at the Record Centre	<sup>4</sup> 7 years
<b>E.</b>	File storage can range between 1 to 20 years, depending on the nature of the documents stored.	<p>Administration 1 year</p> <p>Financial 6 years</p> <p>Legal (Provisional) 7 years</p> <p>Legal (General) 20 years</p>

5 YEAR LIFE CYCLE COST ANALYSIS RECORD STORAGE  
LONDON COURTHOUSE

## FACTORS/ASSUMPTIONS

Annual file volume shipped (cu ft.)	480
Cost to ship per cu ft.	\$44.00
Annual storage cost at Record Centre (paid at beginning of year)	\$3.76 n/a
Average annual volume reduction at R/C	15.0%
MAG annual file shipment (cu ft.)	16,400
MAG file volume stored (cu ft.)	154,000
London volume shipped as % MAG	2.9%
London share MAG storage	4,507
Annual Inflation Rate	2.0% (entered as decimal)
London Courthouse storage space (sq ft.)	8,839.91
Lease cost London Courthouse (per sq ft.)	\$25.00
Cost of borrowing	5.0% (entered as decimal)

**5 YEAR LIFE CYCLE COST ANALYSIS RECORD STORAGE  
LONDON COURTHOUSE**

(\$000)

	Apr-95	Apr-96	Apr-97	Apr-98	Apr-99	Total
Current files at Record Storage	\$16.9	\$16.2	\$15.9	\$15.8	\$16.1	\$809
Ship new files to Record Centre	21.1	21.1	21.1	21.1	21.1	1056
Store new files at Record Centre	1.8	1.8	1.8	1.8	1.8	90
<i>Total Record Centre Cost</i>	39.9	39.1	38.8	38.7	39.0	1966
Annual Inflation Factor	1.0	1.020	1.020	1.020	1.020	
Cumulative Inflation Factor	1.0	1.020	1.040	1.040	1.040	
Total Record Centre Cost	39.9	39.9	40.3	40.3	40.6	2010
Cost of London Courthouse space	220.9	220.9	220.9	220.9	220.9	1,1045
Total Record Storage Lease Cost	260.8	260.8	261.2	261.2	261.5	1,3055
Annual financing Cost	13.0	13.0	13.1	13.1	13.1	653
Cumulative financing costs	13.0	26.1	39.1	52.2	65.3	1957
Total Record Storage Costs	\$273.8	\$286.9	\$300.4	\$313.4	\$326.7	\$1,5012



RECORD MANAGEMENT STORAGE STUDY	Page 5
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IF THE LONDON FIGURES ARE USED AS THE NORM, THE PROVINCE-WIDE 5 YEAR LIFE CYCLE COSTS WOULD BE .....

#### FACTORS/ASSUMPTIONS

A. London sq. ft. lease cost	\$25.00
B. MAG Province-wide average lease cost	\$20.00
C. London 5-year life cycle cost for record storage	\$1,501,200.00
D. London File Storage as a % to MAG total	2.9%
E. MAG 5 year life cycle cost for record storage	<sup>1</sup> (\$1,501,200.00 x 2.9%) x 100 = <b>\$43,534,800.00</b>

### **(c) Current Initiatives**

Computer and multi-media technology are not unknown in the court system, as noted. They are sporadically and incohesively employed, however, and underdeveloped. All is not lost, though. There are some promising initiatives underway that move us toward achieving the necessary infrastructure to support the court process.

The following initiatives demonstrate a renewed commitment to modernizing the justice system and, while there still needs significant development, they give the Review team optimism that our vision for modernizing the system may be achievable

#### **(i) A Province-Wide Network in Infancy**

The Ministry has *the beginnings of* a province-wide Wide Area Network (WAN), with Local Area Networks (LANs) in various centres. The Wide Area Network currently connects about 900 people across the province, and another 800 are scheduled to be connected in the near future, as this Report is being written. By March 31, 1995, there are expected to be approximately 26 sites in Ontario which are interconnected by the Wide Area Network. The Ministry intends to expand this network "as budget allows".<sup>159</sup>

In our view, this initiative by the Ministry represents a critical step in the modernization of the justice system. It is essential that it be continued, and that funds be allocated to give genuine meaning to the words "as budget allows".

#### **(ii) Integrated Justice Strategy Regarding Technology**

Within government significant efforts are underway between various Ministries to create an integrated justice system technology that will provide the necessary infra-

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<sup>159</sup>Integration Technology Project Report to Senior Management Committee of Ministry of the Attorney General, July 1994

structure for our vision. If approved, the investment needed to make not only the civil justice system function more efficiently but the criminal justice system as well, will be forthcoming. We support wholeheartedly these efforts and would strongly recommend that government consider very carefully the potential business cases to be made for this technology investment. We believe this initiative has the ingredients required to bring the civil justice system into the 21st century.

**(iii) The Case Management Pilot Projects: Technology Lessons to be Learned**

The three case management pilot projects in Windsor, Sault Ste. Marie and Toronto are each supported by a technology infrastructure including both computer hardware and software. While the software system which has been leased to assist with these projects has been the subject of some controversy, and has required -- and received -- constant improvements, the case management pilot projects could not have functioned without this support.

It is not the role of the Review to examine in detail, or to critique, the strengths and weaknesses of the case management software package. However, *there are lessons of a general nature to be learned from the experience* of implementing it, we think. They include the following:

**a) Early and Adequate Training of Staff is Essential**

Much of the early controversy which arose regarding the existing software application supporting the case management projects arose because of a perception that the software application was not capable of servicing the needs of the projects. While there remain certain caveats regarding the program, *most* of its perceived inadequacies were a direct result of staff not having the proper training to extract the best from the program.

*Staff training* on the use and flexibility of the software *did not occur until approximately three years after its installation*. Had such training been provided earlier,

(i) staff, administrators and judiciary would have had a clearer and more comprehensive understanding of the system and its functionality, thus enabling them to utilize its features more fully and more effectively, and minimizing the frustration, inefficiencies and costs flowing from this lack of understanding; and,

(ii) there would have been less need to develop local companion applications in other software with the additional costs and time considerations accompanying such a need.

Early and adequate training of users of the system is therefore essential. While there is a cost factor in such training -- it is estimated that an additional 10% should be added to the cost of a system to encompass aspects of training -- the full benefits of whatever system is put in place cannot be achieved without it. Moreover, the training will be required at some point; and in the long run, the price of delaying it far outweighs the initial cost.

b) It is counterproductive simply to automate existing manual systems.

The software application system implemented to support the case management projects was configured to automate administrative procedures which had been done manually. There appears to have been little effort to re-think those procedures from the process management perspective, in light of today's technology and in light of the needs of case management. As a result many inefficiencies in the system have been perpetuated.

It is important, when addressing the software needs of a system, to articulate clearly the procedural requirements of the newly designed system. Only then can the resulting expectations of a software application suited to the new procedures be properly identified.

c) Avoid the Need for Extensive Data Entry by Court Staff

The existing case management software application requires a great deal of data entry by court staff. Heavy workload pressures in busy centres cause time lags in the entry of data and errors in data entry. As a result, the data produced by the system is not as timely as it should be; moreover, it is not as reliable as it should be, and requires implementation of additional checking at various points of the process, something which in turn adds costs and is less efficient.

The lesson from all of this is that whatever software application is eventually chosen to support the case management and management information dictates of the civil justice system must feature as minimal manual data entry at the court office as possible. The information must be captured, upon entry, in a reliable, multi-functioned *and consistent* way.

(d) Useful and Consistent Management Reports Should be Generated.

The present software produces reports for the case management projects that are not as useful or as suitable and desirable for the Administration and the Court. Customization of the reports is needed.

A supporting software system must produce information that is reliable, relevant, useful, standardized, and must be available on-line.



(iv) **The Gathering of Statistics: the Courts' Information Statistical System ("CISS")**

*"The government is very keen on amassing statistics. They collect them, add them, raise them to the nth power, take the cube root and prepare wonderful diagrams. But you must never forget that every one of these figures comes in the first instance from the village watchman who puts down what he damn well pleases".<sup>160</sup>*

The Ministry also collects data currently from across the Province and inputs it into a computer data base, for purposes of generating statistical information. There is no cohesive, standardized province-wide system for doing so at the present time, however, and the statistical gathering exercise depends upon the initial assembly and entry of information and data manually by staff. In such a system, the potential for error in the simple transfer of data from one medium to another and for inconsistency of input as a result of differing interpretations of data are great.

The system produces some useful information, and great improvements have been made in its reliability in the past two or three years. Efforts are being made to continue those improvements. However, because of the frailties arising from the manual entry of that data and from "local interpretation" of non-standardized entry criteria, the information begot by CISS is sometimes neither consistent, dependable nor accurate.

Moreover, the information which is collected is collected at an aggregate (or macro) level, and is not case specific. It measures such things as the flow of cases into the system, the number of cases on trial lists and the number of cases that go on to trial. It measures, in addition, the number of motions, the number of applications and the overall number of cases disposed. It provides certain information about types of cases, but only within restricted parameters such as: family and children's

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<sup>160</sup>Sir Josiah Stamp, English Inland Revenue Department, 1896-1916



law; motor vehicle; construction lien; probate; and "other". In locations outside of the three case management pilot projects in Windsor, Sault Ste Marie and Toronto, decisions as to how each case is classified are made by court staff rather than by litigants or their counsel.

While this sort of aggregate information is helpful, and indeed necessary, it has numerous limitations and infirmities.

For one thing, the method of gathering and developing information amounts basically to the counting of numbers. It does not lend itself to tracking information about what is actually happening throughout the system which would be useful for the overall management of the system. For instance, *it would be helpful to know more:*

- a) about the types of cases dealt with in the system;*
- b) about who the litigants in the courts actually are -- individuals, corporations, businesses, associations ? -- and whether they are represented or not;*
- c) about the dollar amounts of the claims involved, and the amounts of the judgments ultimately obtained;*
- d) about the number of motions in each case, and the length of those motions;*
- e) about the type and timing of various kinds of dispositions;*
- f) about costs;*
- g) about appeal rates for different types of cases;*
- h) about the aging of claims from the date of the cause of action through the various stages of litigation;*
- i) about trial and motion scheduling effectiveness (i.e. how many cases settle, are adjourned or cannot proceed because of the unavailability of sufficient court time or space);*
- j) about the correlation between case management events and case disposition rates and timing;*

- k) about the correlation between trial management conferences and trial length;*
- l) about the use and effectiveness of available options (e.g. teleconferencing or video conferencing);*
- m) about the results of monitoring the use of specific courtrooms or court locations for different purposes; and generally,*
- n) about how to determine the amount of judge time, or number of judge days necessary, in across the Province, and in the various court centres, to enable the system to operate effectively.*

This list is not exhaustive. The definition of the types of information required to enable the civil justice system to be managed effectively is an important task which must be addressed.

In addition to the foregoing weaknesses in the present method of collecting data, that exercise is currently conducted in a manner which lends itself to the numbers captured being distorted -- or at least their meaning blurred -- by the dictates, interpretations and perceptions of those collecting them.

Courtroom utilization statistics, for example, are a case in point. A different format and different type-of-case information is employed in accumulating figures for that purpose than is employed in generating the aggregate reports referred to previously. Consequently, it is not possible to make cross-references between the two kinds of reports.

Courtroom utilization statistics are viewed with a jaundiced eye by many members of the judiciary. They are suspected of being an attempt by the Ministry to produce an unrealistic measurement that will serve as a rationale for reducing the number of courtrooms. Courtroom time is not counted as being "utilized", for example, when the Court has been adjourned for meetings with the judge in

chambers or to accomodate settlement discussions between the parties during the trial. If those discussions begin during the morning but continue into the afternoon, and court is not reconvened, the courtroom is considered to be idle, even though it must be ready for the trial to continue if the case does not settle.

Thus, while the statistics generated by these courtroom utilization reports give some indication of the number of *hours that courtrooms are in session* across the province, they do not provide meaningful information about the amount of *work that is being done by judges, lawyers and litigants outside of, and in the shadow of, the courtroom.*

The presence of a courtroom, ready for the commencement of a trial, is itself a critical motivator for the settlement of cases. Moreover, as judges move towards case management, additional time is being spent by them outside of an actual courtroom in the management and settlement of cases. These activities must be recognized and measured as well.

Finally, as information is captured, it must be captured in a reliable and consistent way, with as little human intervention and interpretation as possible. As much as can be, it needs to be collected automatically, so that whenever a case enters the system information respecting it can be gathered immediately and compiled in a way which allows the necessary management reports to be produced in a timely fashion.

#### **(v) Court Reporting Pilot Projects**

The accurate recording and transcription of evidence in the courtroom is critical for the proper functioning of a court of record. Traditionally this function has been performed by a court reporter or stenographer who is present in the courtroom to "record" what is said. Techniques have included the pen, of course, and in latter years the stenograph machine and the stenomask in combination with a tape recorder.

As outlined and described in the next section of this Chapter, new technologies have developed and are continuing to develop. These include the use of open-mike audio recording, computer assisted transcription ("C.A.T.") and voice activated transcription ("V.A.T."). Open-mike audio recording and C.A.T. technology are in common use in various jurisdictions today. V.A.T. technology is still in the development stage.

The Ontario Government, in conjunction with a Joint Committee on Court Reporting -- comprised of representatives of the bench, bar, administration and court reporters -- is currently examining these available technologies with a view to making recommendations to the Ministry on the issue. At the present time, there are three audio-recording pilot projects in existence. They are located in London, North Bay and Picton, and their results will be evaluated by the Committee.

While we have not visited these pilot projects, members of the Review have visited court facilities in Hull and in Quebec City where audio-recording facilities are utilized. They appear to function well, and to provide adequate tapes for transcription, in properly equipped facilities. Audio-recording is the technology of the late 1970's, however, and while it appears to function satisfactorily in such circumstances, it is not a technology which is readily compatible with computer technology that is developing.

These factors, together with the costs of various options, need to be carefully weighed before determining which technology should be adopted on a large scale basis.

### 18.3 TODAY'S TECHNOLOGY

There are many applications of computer and electronic technology *which are available* on the commercial market *and ready for utilization to-day*, and which can make the civil justice system function more effectively. Although the introduction of such technology will involve initial capital expenditures in terms of hardware, software and training, *these technologies will save money in the (not very) long run and are worth the investment*. They include -- to name but a few -- applications which permit:

- a) *electronic filing* of documents directly from lawyers offices to the court data bank -- computer to computer -- by fax/modem, E-Mail, or other similar method of electronic data transmission;
- b) *electronic imaging* -- "scanning", it is called -- to facilitate the input of documents brought to the courthouse by those who do not have the equipment for direct electronic filing, or by litigants acting on their own behalf;
- c) *electronic mail* (E-Mail) -- provides for the exchange of information electronically through the use of telephone lines. The use of E-Mail is widespread within both the government and the private sector. It provides the basis for electronic filing of civil cases.
- d) *automatic payment* of filing and other fees by debit or credit card;
- e) *video conferencing*; numerous people, in various locations remote from each other, can conduct meetings through the use of connected video services. Video conferencing operates through a visual and audio environment, utilizing telecommunication services such as fiber optic cable, coax, microwave transmissions, infrared transmissions, or a combination of the foregoing.
- f) *the generation of accurate statistics* for purposes of financial and administrative management;
- g) *the scheduling* of cases, motions, case conferences and most other "events" in the system;
- h) *the storage of data* with much smaller space requirements and in a manner that makes it *accessible simultaneously* by anyone requiring and entitled to access, from anywhere, for any number of purposes related to the processing of cases.



A CD-ROM is a physical device for storing and retrieving information. In appearance, it resembles a compact disc device containing music. The CD-ROM is capable of holding a great deal of information. Normally, a CD-ROM access device can accommodate 1 to 20 or more CDs at the same time (depending upon the device). Each disc on the device can be accessed simultaneously.

CD-ROM technology is used to store and gain access to large quantities of what would otherwise be many bookshelves of materials. For example, all of the decisions of the United States Supreme Court from its creation can be obtained on a single CD-ROM disc. The same thing could be done with federal and provincial statutes, regulations, Rules of Practice, practice directions and any number of other legal digests and periodicals. In fact, the Ontario Citator Service is now available from Canada Law Book Inc. on CD-ROM.

i) *Teleconferencing* -- Multiple numbers of individuals, in various remote locations, can converse or conduct meetings through the use of connected telephones. This is strictly an audio environment. With connected computers and recording devices, exchanges of information and a record of the meeting can occur.

The Rules of Civil Procedure in Ontario currently provide for motions and applications to be heard by conference telephone call where an appointment is obtained from a judge or officer before whom the motion or application is to be heard.<sup>161</sup> Pre-trials may be held by conference telephone call where all the parties and the judge consent.<sup>162</sup>

j) *Touch Screens* -- Touch screen automated information and counselling centres are available today in some court locations in the U.S.A.

Touch screen technology permits the design of self help computerized information centres. The system is graphically driven, with audio reinforcement. The user gains access to information in the system simply by the process of touching specified areas on a monitor.

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<sup>161</sup>Rule 37.12; Rule 38.12

<sup>162</sup>Rule 50.08



"Kiosks", or other forms of automated information centres are the most frequent application of this form of technology. They allow the public ready and easy access -- in courthouses or in other public places remote from the courthouse -- to such things as

- automated information regarding the courts, court procedures, the status of cases and court calendars;
- automated information for jurors, and the ability to make telephone inquiries regarding service, attendance, fees, court locations, etc.;
- automated information centres to provide support for children in family matters, for witnesses, or for victims;
- automated Government directories.

k) *Audiotext, with Voice Response Unit (VRU) and Interactive Voice Response (IVR)* -- Audiotext is a passive application using a touch-tone telephone, which allows interaction between a person and pre-recorded scripts or programs to provide verbal information. With the added feature of a Voice Response Unit, the application can access a database and bring back, through a digitized voice, the answer to a question posed through the scripts.

Interactive Voice Response technology incorporates audiotext (pre-recorded scripts) and Voice Response, and adds the capacity for interactive action. For example, it allows enquiries about and the payment of fines, using a credit card.

These forms of technology, together with touch screen technology, are central to the concept of "kiosk" access to information.

l) *Voice Recognition and Voice Activated Technology* -- Voice Recognition is a technology which involves the ability of a computer to identify and learn a person's voice patterns, and to interpret them into text electronically. Voice Activation permits an activity to occur by voice command.

These technologies form the basis for the "voice activated" computer, which has the ability to create Wordprocessing text out of its human's voice.

They are also the basis for an extremely sophisticated form of evidence transcription. In this form of transcription a reporter speaks into a stenomask and the computer converts his or her voice to text immediately. The text is viewable on a computer screen almost simultaneously, and can be projected on a larger screen in the courtroom for the assistance of jurors, the hearing or visually impaired, or anyone else in the courtroom. "Real time" reporting is the name given to this phenomenon.

m) *Computer Aided Transcription (C.A.T.)* -- The C.A.T. system of evidence transcription uses a stenograph writer, which is a machine into which the reporter enters the proceedings in the form of stenographic symbols. These symbols are printed on a running tape, similar to an adding machine tape, as well as onto a computer disk.

When the proceedings are complete, the reporter removes the disk or tape from the writing machine and inserts it into a computer that has a special C.A.T. software. The computer produces the transcript by translating the stenographic symbols into English from an individual, personalized dictionary developed by the reporter. The reporter proof reads the computer produced transcripts, making all necessary corrections. When the verification process is complete, the transcript is printed and is available in both written and diskette form.

"Real time" transcription is available in an unedited form, using this technology.

n) *Video Recording* -- In the United States, video recording to create the official court record is becoming increasingly popular. There are experiments in many states. Video recording systems commonly consist of:

- a series of voice activated cameras with a manual override and control operated by the judge or a designated member of the court staff
- tape logging performed by the operator of the system (either the judge or a member of the court staff)
- four or five recording units
- a tape storage system
- capability for media hookup
- the ability to provide copies of video tapes to counsel on request with or without a fee attached

o) *Open Mike Recording* -- Open mike recording is a technique for court reporting of proceedings using a tape recorder. No court reporter is present in the courtroom, but the tape is monitored, either by a member of the courtroom staff or by personnel in a central recording room.

In facilities where there is a central recording room a bank of tape recorders transcribes the proceedings from different courtrooms simultaneously. One multi-track master tape operates as a backup for all transcriptions.

In properly constructed facilities with properly equipped courtrooms and proper sound recording facilities this technology produces an accurate transcript. Time and events are logged at regular intervals, and evidence can be "read back" during a trial or hearing, on request, within a very few minutes. Tapes can be made available to the judge, the lawyers, the media or other members of the public. Hard copy transcripts can be produced, either by a court reporter or by the recipient of the tape.

p) *Bar Coding* -- Bar coding is an inventory control system which allows the user to record product or file information in a condensed version using varying width sizes of black straight lines, assembled in a specific fashion and which can then be read through the use of an electronic scanner. The details contained in the bar code can be converted to text or connected to a data base for tracking.

Apart from the enhanced management information that would be generated from the investment in these technologies, the amount of savings in terms of reduced paper flow, reduced storage, and the re-allocation of staff will be very significant.

Given the advantages of these modes of technology -- including the compelling business case which exists for them -- it is imperative, in our opinion, that steps be taken immediately to expedite efforts to automate the civil justice system. The responsible utilisation of public resources in an age of competing claims on such resources by different segments of government mandates nothing less.

#### **18.4 ONTARIO'S NEEDS**

We turn now to an analysis of what are the needs of that system which these technology tools can help to meet.

A brief word of caution may be in order before doing so, however. Without a cultural change in the way we approach the need for documentation and the presentation of information there is a risk that the "information superhighway" will

be engulfed by the information society's version of Noah's flood. Because it will be easier to transmit materials electronically to the Court there will be a temptation to transmit more, and to do so indiscriminately. This temptation must be resisted. The object, after all, is not to drown the recipient, but to help everyone involved to understand the dispute and, thus, to be able to resolve or decide it.

In addition, ingrained habits which drive people to reproduce material in hard copy on a "just in case" basis rather than on an "as needed" basis, make it debatable whether technology will indeed reduce the amount of paper being handled, without such a cultural change. *The Lawyers' Weekly* recently reported, in fact, that the opposite seems to be true. In an article dealing with technology in the law firm entitled "Is the Paperless Law Firm just a Pipe Dream ?", this legal publication said:

"Dreams of a 'paperless office' appear to be going up in smoke, according to a recent survey which shows paper use is actually up in about 50 per cent of Canadian companies....

".... half the companies surveyed use more paper as a result of computer and electronic technology. .... The top reason for increased paper use is that employees like to keep hard copies of their work, according to 62 per cent of the companies."

" .... It's estimated that office workers in North America handle 21 trillion pages of information every year and create one million new pages every minute of every working day."<sup>163</sup>

Overall, what is needed in Ontario, in our opinion, is a province-wide system of Wide Area Networks, Local Area Networks and computerized work stations that will feature and ensure:

- a) the establishment of a functioning management information system which will permit those working within the system to have timely and current access to reliable and accurate statistical data for analysis, research and management purposes;

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<sup>163</sup>From the article, Is Paperless Law Firm Just a Pipe Dream?, *The Lawyers Weekly*, 14:24, October 28, 1994, pg. 13.

b) the significant streamlining of the capture and flow of information, by electronic means -- between courthouses and the legal community, between courthouses and the public, and between administration and judiciary around the Province -- in order to eliminate the avalanche of paper which is paralyzing the system and the excessive cost accompanying it, and in order to expedite the civil justice process generally;

c) the creation of opportunities for the public to have access to the system through such available technologies as kiosk terminals (using "touch screen" computers) in public places, shopping centres and court information centres, thus permitting the public to do business with the courts without necessarily attending at or telephoning court offices;

d) the utilization of video technology, where appropriate, to aid the court and parties to deal with matters over long distances without the inconveniences and expense of extended travel;

e) the support to caseload management and the approach to the processing of cases through the system which it entails, through the creation of a province-wide computer network and software program which will enable it to operate effectually in a way which will facilitate a timely and responsive civil justice system.

f) an improved and more streamlined workplace which will enable administrators and judges to perform their functions in an effective and fulfilling way; and,

g) the necessary co-operation and co-ordination between the Bar, Courts Administration, and the Bench, to ensure compatibility between the technology systems in use by each.

h) an enabling set of Rules of Civil Procedure which will allow for the use of multi-media technologies for processing work in the courts.

### **The Need for an Accurate and Reliable Management Information System**

*This need cannot be overemphasized.* Accurate civil justice statistical information is a critical element in developing an effective strategy to manage the Courts' caseload.



The requirement for a management information system must be differentiated from the need for an automated infrastructure to support caseload management. They serve a different purpose. A "management information system" is necessary for the monitoring and evaluation of the effectiveness of the civil justice system as a whole. The support system for case management, and the "management information" which it produces for that function, are necessary for dealing with the specifics of caseload management. Both are important.

*However, the civil justice system simply cannot continue to function without a proper management information system which generates dependable data and statistics on a province-wide, regional and local basis. The implementation of such a system must be made a priority.*

#### **RECOMMENDATION:**

**We therefore recommend that steps be taken immediately to put in place the necessary technology for the creation of a proper management information system for the civil justice system, and thereafter to implement such a system.**

#### **The Need to Manage and Control the Information and Documentation Circulating in and out of the System**

Information handling -- the recording, retrieving, transmitting and storing of documentation and data -- is the second major sphere in which technology can play a significant role in improving the problems of the civil justice system. We are literally drowning in paper and in information. Originals, photocopies, facsimile messages, copies of the original facsimile messages, computer printouts, diskettes, (E-mail) messages -- the list is virtually endless. Yesterday's methods cannot handle this inundation. We are being driven to this change, moreover -- and will be driven to a certain extent by it -- as a result of the increase in speed, generally, and the increase in turnaround time, particularly, generated by the force of these factors on the Court by outside influences.



The pleadings, affidavits, notices, memoranda of argument and other documents produced by the parties, generally through their lawyers, in litigation, together with the reports and documents produced by and on their behalf as exhibits and evidence, form the grist of a lawsuit. At present these documents, and the information contained in them, are recorded, stored, secured and transmitted manually. We observe in passing that most of them have already been prepared electronically in the lawyers' offices, and produced in hard copy to be filed with the Court. Court staff then are required to extract, manually, from those documents the necessary information to provide a record of the Court's activity. As already noted, they review the documentation -- or, at least, some of it -- for information to be recorded into the Court's statistical base, returning it in the process to its original electronic form.

There are significant administrative costs associated with the performance of these tasks, and limited and expensive space must be allocated to the storage of court files.

While a totally "paperless court" may be no more than an amazing technicolour dreamcoat in the eyes of some high technology purists and court administrators of that persuasion, it is much more closely attainable -- *and attainable in commercially viable ways* -- than it was a few short years ago. Many of the benefits of such a system are readily available today.

When information is entered into a computer system, it can be shared by many users at the same time. Transmission of documents, and of the information contained in them, can be accomplished instantly by the use of a few key strokes on a computer. Storage costs are radically reduced. The possibilities of losing documents are virtually eliminated. Data is captured in a consistent and accurate manner. Moreover, it is captured, and saved on backup, in a secure manner.

The technology which makes the creation of such an environment possible today is described in more detail elsewhere in this Report. In summary, however, it encompasses such things as filing by diskette, electronic filing by remote modem access, electronic imaging, E-Mail, facsimile methodology and the technology of telephony.

### **The Need to Provide Service to the Public, Directly**

It was submitted to the Review on many occasions that there is inadequate information about the system and its processes available to the public, who are the ultimate users of the civil justice system. To the extent that such information exists, it is not readily accessible or in a format that is easily understood by members of the public.

We believe that information about the system and its processes should be made more readily available to the public. This can be done through the distribution of pamphlets and other written information in court locations and in other public places in the community. Technology provides other mechanisms, however, to facilitate the task, and to broaden the scope of dissemination. Some of these technologies include familiar devices such as video tapes, "touch screen" computers, and technology based on the use of the telephone.

It is quite possible, at present, to do most of one's banking and to pay most of one's bills by telephone. Kiosk and "touch screen" technology is already in use for such things as the payment of traffic fines and the renewal of drivers' licenses. Why should it not be possible to contact the court system and elicit at least basic information about the courts, about how to access them and about what is happening in them, in the same fashion, using an extended version of these mechanisms ?

In short, technology can be used in this sense to:

- (i) increase public access to, and public awareness of, the civil justice system;
- (ii) ensure the consistency and quality of information provided to the public, and its wide dissemination;
- (iii) maximize the effectiveness of existing staff resources;
- (iv) ensure that in this context the members of the public are given *information only* and *not legal advice*;
- (v) provide easy information updates;
- (vi) allow for remote access to court information;
- (vii) allow for access outside of "normal" business hours.

These sorts of technology systems would be discrete and separate from those systems that might be required to support the actual court processes, in order to ensure security, data protection and confidentiality.

Potential exists for co-operation between the provincial and federal levels of government, and between provincial governments, for the shared use of hardware systems and technology which are already in place, and for the cost savings which can accompany such co-operation. For instance, as previously mentioned, Ontario is presently using kiosk technology for motor vehicle licensing matters and for payment of fines in some areas. The Federal Government uses a similar form of technology for the provision of income tax information and for unemployment information services.

### **The Need for Video Conferencing**

Video conferencing has been defined earlier in this Chapter. Briefly, it involves multi-point communications between persons in the same and different

locations, both in audio and video, and through the medium of telecommunication transmission services.

In its most sophisticated form video conferencing can provide,

- interactive communications featuring high quality audio and video transmission, with full colour and motion;
- simultaneous conferencing amongst many people located in multiple places;
- graphics and fax capabilities
- storage and retrieval of images; and,
- communication of data.<sup>164</sup>

Video conferencing technology is complex and, at present, expensive. However, like many things relating to technology, improvements are rapid and costs are falling.

The Ministry of the Attorney General is experimenting with video conferencing in pilot projects respecting bail remands in London and Kingston. In the United States, between 150 and 200 courts are using this technology for first appearances and misdeamour arraignments. Although the process has been used primarily in the criminal field, the members of the Civil Justice Review believe that it has marked potential for certain civil proceedings -- particularly for motions, applications, and case conferences of one sort or another. It might also be useful for the presentation of some forms of expert testimony at trial, and, perhaps, for other purposes at trial. The extension of video conferencing to the trial process raises difficult issues with respect to the conduct and general fairness of the trial, however, and would require much careful consideration before implementation.

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<sup>164</sup>As to this, and as to video conferencing generally, see John Arnstein and James D. Goodwin, III, 'The Technology of Video Conferencing', Session No. 401, Fourth National Court Technology Conference (CTC4), National Centre for State Courts, October 1994 [hereinafter 'Arnstein & Goodwin']

Nonetheless, there is little doubt that video conferencing technology creates the potential for reduced costs and greater flexibility in the system. It facilitates access to each other by parties, lawyers and judges for purposes the disposition of many pre-trial matters. It opens up the capacity to deal with remote testimony in interlocutory matters and even -- subject to the caution expressed above -- for dealing with certain kinds of evidence at trial. It eliminates a great deal of travel by parties, witnesses and lawyers, in particular, and saves the time and costs attendant upon such travel.

Video conferencing is a very practical way in which a judge, who is away from his or her home base on circuit, can continue to deal with case management hearings or conferences that must be attended to while on the road.

Finally, we believe that the use of video conferencing has particular potential to benefit members of the public, the Bar, administrators and judges in the northern parts of Ontario. Distances define the North. All of the characteristics which make video conferencing attractive in any environment, make it doubly so for those who must have access to the courts in the North East and North West Regions of the Province.

Because video conferencing remains a complex and expensive innovation, care and planning must accompany its introduction.

## **RECOMMENDATION**

**We therefore recommend that a pilot project be established to test the utility of video conferencing technology in civil matters. We suggest that the project be established amongst a number of communities in Northern Ontario.**



There is no reason why efforts should not be made to co-operate with other Departments of Government in those communities to share the costs and the benefits of such a program.

Arnstein and Goodwin have emphasized that thorough planning is critical to the success and affordability of a video conferencing project. In their presentation to the Fourth National Court Technology Conference, sponsored by the National Centre for State Courts in October 1994, they said (in a passage entitled "Some Critical Success Factors for Implementing Videoconferencing":<sup>165</sup>

For courts to successfully implement videoconferencing, several key issues must be addressed. These include:

- **Procedures** - videoconferencing applications that involve multiple agencies, such as arraignments, require very careful coordination of procedural changes;
  - **Project Management** - Each project must have a project manager responsible for development and ongoing operations. The project manager must have top management/judicial commitment, and also be supported by working groups of users for each functional area;
  - **Training** - Adequate time and resources must be allocated for training in both the operation of the technology and in new procedures; and
  - **Staffing** - Users must develop a clear understanding of what staffing is required to operate the videoconferencing system. This will depend on the complexity of the system and application. Options include full-time dedicated operations staff, part-time dedicated staff, or user operators.
- Jurisdictions investigating video technology must begin by first reviewing their application. Because of the wide range of available solutions for incorporating video technology today, a thorough assessment of a court's present needs, as well as its future operations must be conducted. Some of the universal questions that should be asked include (1) How many different sites must communicate together? (2) How frequently is the equipment to be

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<sup>165</sup>Arnstein and Goodwin, *supra*.



used? (3) Are groups of people (as opposed to single individuals) going to appear on camera at each site? (4) Does every video participant have to see each other? (5) Is this recorded? (6) What communication services do the local carriers offer? (7) How much money is available for one-time equipment purchases? (8) How much money is required for recurring expenses? (9) What other types of future uses can be identified?

### **The Need to Provide a Supporting Infrastructure for Caseload Management**

As described elsewhere in this Report, caseload management is essential if the modern civil justice system is to meet the challenges of caseload growth, particularly in the urban centres.

We have earlier described the need for, and the role played by a proper technology infrastructure in the provision of management information for the three case management pilot projects. With our recommendation that caseload management become the norm across the Province, this need is even more pronounced.

Technology is important to case management for other reasons, too, however.

Monitoring is an essential aspect of the case management imperatives. The elements of such a system include early intervention and evaluation of incoming cases and the scheduling of events which allow for supervision of the progress of each case. There is a need for tracking of cases according to pre-determined time standards which set the parameters for completion of the various phases of litigation. These events must be monitored, and the only way in which such monitoring can be accomplished effectively is for each case to be entered into a system that can diarize the events.

Supervision of cases requires an ability on the part of judges and administrators to make direct inquiries as to the progress of the litigation. In a

manual, paper-based environment, such a task is overwhelming, if not impossible. In an electronic milieu, it can be done with the stroke of a few keys.

Lawyers, too, will be seeking readier access to information regarding the status of their matters, because of the dictates to adhere more strictly to time lines in a case managed system than in a non-case managed system. Remote modem access makes it possible for them to do so directly from their office, or from wherever their lap top computer rests.

In a totally electronic environment, the documents in a case, and the information contained in them, can be retrieved at any time by more than one user - from anywhere access is available by modem, by E-mail or by any other method of computer communication. Case conferences and settlement meetings can be held anywhere where there is access to the system. Tele-conferencing and video conferencing can unite parties in different locations, for similar purposes, or for the disposition of motions.

For a superior trial court that will continue to circuit around the Province, these tools have particular importance for the effective management of the Court's caseflow.

### **The Need for an Improved and More Streamlined Workplace to Enable Administrators and Judges to Perform their Functions in an Effective and Fulfilling Way**

There is an urgent need to improve and to streamline the workplaces of judges and administrators in order to maximize their effectiveness and, thus, to maximize the utilization of public resources in this respect.

While larger technology applications are critical to serve the macro needs of data and information handling and case management, there are many micro-level

applications which can be used to enhance the ability of individuals in the system to perform their tasks.

### *The Judiciary*

Access to, and the ability to use, modern computer technology is an enormous aid to a judge in carrying out his or her work.

The work of a trial judge is varied and complex. Judges do not simply spend their days observing and listening to witnesses and lawyers, and then, at the conclusion of a case, drawing upon some deep pool of wisdom and experience to instruct a jury upon the law or to give judgment. They do observe, listen, instruct juries and give judgments; but much happens in the course of that process regarding which computer technology can be a great support.

A judge must take notes. Occasions where transcripts of the evidence are made available are very rare. Note taking is time-consuming, tiring and attention-diverting. Observing the witnesses, and the general courtroom setting -- over which it is the judge's duty to preside -- are difficult. Trials are becoming increasingly long and complicated, and the evidence led at them similarly lengthy, complex, technical and scientific. The challenge of taking accurate and dependable notes increases accordingly.

Unfortunately, as one group of judges submitted to us,

this vital note taking process has developed little for most judges since the time courts of record first came into existence. The line of technological advancement may be summarized in this way: from the quill pen to the steel nib pen, to the fountain pen, (many have stopped here), to the ball point pen, to the roller ball pen!<sup>166</sup>

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<sup>166</sup>Submission to the Civil Justice Task Force from the Technology Committee of the Ontario Court of Justice (General Division), November 1994.

## **PART III**

## **COMMUNICATION**



Notes have traditionally been inscribed by judges in Ontario in red "benchbooks". These books serve as the basis for their findings of fact and their judgments, and are kept and stored as their record of the proceedings. The writing in them is generally illegible. They are cumbersome to organize for purposes of preparing jury instructions or decisions. They occupy a great deal of storage space over the years, and are not always easily accessible. Moreover, they are expensive.

None of these sorts of problems need any longer exist, in the day of the lap top and notebook computer. Nor should they.

Even where a computer is used only for wordprocessing purposes, it is immensely helpful to the user. A judge who prepares his or her own judgments and uses the computer for other organizational tasks is a judge is a more efficient and effective judge.

In terms of assisting in the processing of cases, however, the computer has incalculable advantages. Notes which are taken on a computer are legible, easily organized and searched for purposes of preparing jury instructions and decisions, accessible, and capable of very economical and convenient storage. Jury charges and memos of law can be stored in electronic form, quickly and easily retrievable. Research is facilitated and expedited. A computer equipped with a modem or a fax modem provides ready access to Quicklaw and other legal data bases, and the ability to communicate with other judges, law clerks, court administrators and even law firms. This latter flexibility is particularly valuable for a judge who is out on circuit.

After describing his odyssey from yellow notepad to notebook computer, and his use of the instrument as note-taking vehicle, legal research tool and mechanism



for the assembly and preparation of decisions, one American judge concluded as follows:<sup>167</sup>

"I do all this on a notebook computer that weighs about six pounds. The keyboard is quiet enough for courtroom use, the screen bright and colorful..... The size of the computer permits me to use it on the bench, carry it into chambers, take it home when I need to complete a project or review my notes, take it on the road when I work out of town. Attached to a Local Area Network, it is a communications tool in the courthouse. Attached to a fax/modem, you can deliver your written opinion to counsel's office before they can make it back from your courtroom. You can reach out to legal and nonlegal databases, such as Westlaw and Lexis. You can communicate with colleagues across the country and even around the world on Internet or another online service."

While judges cannot be compelled to drink from the fountain of new technology, the availability of such technology should become the rule, and those who are already computer literate, or who are prepared to devote the time and effort to becoming so, should have that opportunity.

This should not be something which is dependent entirely upon the judiciary demonstrating that they can make some sort of "business case" for such innovations, and thus save the government money -- although such a case can be made. A judge who works more efficiently and more effectively, with modern aids, and who draws upon a reorganized support staff in respect of these matters, is a judge who is less costly to the system, who is more productive, and who is better able to deliver a higher quality of justice. In virtually every other segment of society, however -- be it in the home, be it in business, in government, or in the legal community itself -- the wide use of available technology is recognized and accepted as indispensable to the efficient collection, storage, and processing of information and to the efficient conduct

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<sup>167</sup>Hon. M.E. Donohue, Judge, Superior Court of the State of Washington, at a Session entitled "Technology at the Bench" (Session No. 203), Fourth National Court Technology Conference (CTC4), National Centre for State Courts, October 1994.

of daily work. We believe the judiciary should have access to the prevalent technology so that they can derive the many benefits in the performance of their important work.

### *Administrators and Staff*

To no less an extent do administrators and staff in the various court service centres around the Province require the availability of modern computer technology for the performance of *their* important tasks. While individual computers and work stations are springing up, the Courts Administration Division of the Ministry of the Attorney General lags behind other Ministries, in reaping the benefits of the new technology.

As we have frequently noted, with the exception of the three pilot case management project locations, the co-ordinated use of computer technology is not widespread across the province in the civil justice area. Manual entry, manual record keeping, manual storage, and the manual handling of information and documentation are commonplace. They are also expensive for the system, and personally stultifying for those performing the functions.

Staff need to be able to work in an environment where what they do is seen and understood to be useful in their tasks of serving the public and the Bar, and in supporting the judiciary. This is difficult, if not impossible, where many of those tasks are unnecessarily repetitive, hopelessly outdated, boring, or outright redundant.

Submissions from Courts Administration representatives across the Province consistently pointed out the need for automation in its varying forms, and in particular the need for such things as:

- a proper networking system
- office and user terminals for information access

- access to court lists by lawyers
- applications permitting the monitoring of events and results in a case; file tracking; automated accounting, including the payment and recording of fees; and the generation and capture of case aging, management and statistical information

### **The Impact of Technology on the Bar and the Need for Co-ordination and Compatibility Between the Bar and Courts Administration**

The widespread introduction of technology will have an impact on the Bar as well and will require co-operation and co-ordination between Bar and Administration to ensure that the systems in use are technically compatible.

Our consultations with various law associations and law firms revealed that lawyers and their firms, generally, are much more advanced in the utilization of computer and electronic technology than are the courts. Larger law firms, in turn, typically operate more sophisticated systems than do smaller sole practitioners. There are firms where the level of technology consists of an electronic wordprocessor only, but we suspect that the number of such firms is dwindling rapidly. The cost of technology is clearly an issue for smaller firms. However, technology can make smaller firms more competitive.

Law firms tend to purchase software applications which have been developed commercially to address the performance of specific functions such as the handling of estate matters and real estate files, the management of documents and transcripts in litigation proceedings, and the performance of bookkeeping and accounting functions. Remote access to court files, the electronic filing and retrieval of court documents, the automatic payment of fees, etc. will require additional software programs and purchases. Lawyers, like everyone else, will require time, training and experience to become accustomed to such changes.

We have noted that within the Courts Administration system, where technology does exist, there are a variety of unconnected and unco-ordinated systems and applications in use. The same is true in the law firms. Software programs and applications in use vary widely.

*It is therefore of critical importance that representatives of the Bar and representatives of Courts Administration co-operate and co-ordinate their efforts in respect of the installation of technology systems, in order to ensure that the Bar's systems and the Court's systems can communicate effectively with each other, technologically speaking. Standardization requirements, protocols and communications formats must be worked out.*

The introduction of a technology interface between Courts Administration and the Bar will have significant impact upon the practices of lawyers, as well as upon the working environment of administrators and judges. These impacts cannot be ignored, and the Bar must prepare for them. They include such things as:

- major investments in hardware and software
- major investments in training of lawyers and staff
- the conversion of existing files and systems to a new environment
- the location of dependable suppliers and services to support and maintain the new systems
- decisions about whether to develop and maintain systems internally or whether to purchase from outside third parties
- the need for support for the entire system from all groups

There are great advantages, however. Firm and client information can be stored, retrieved, analyzed and converted to working product more easily and less expensively. The time needed to prepare material for the Court, *and to file and*

*deposit the material with the Court*, is significantly reduced. Communications are improved. Information about what is happening with a case is readily obtained -- at any hour of the day or night, from any location where a computer and modem is handy, and by any number of authorized users -- without the expense and delays of attending at a court counter and waiting in line.

Information retrieved and handled in such a fashion is worth money to lawyers and their clients. There is some consensus amongst the members of the Bar that a service fee would be appropriate, and accepted, for access to such things as the status of trial lists, the status of files generally, and dealing with consent adjournments.

The creation and handling of documentation, however, is the major area in which computer technology in the law firm and in Courts Administration will connect. By far the greatest portion of the documentation which must be dealt with in the system is generated in, or at least comes to the Court through, the lawyers' offices in a seemingly never-ending flood -- pleadings, notices, affidavits, discovery transcripts, exhibits, reports, motion and application records, trial records, case books, memoranda of argument. With an appropriate software program, coupled where necessary with electronic imaging technology, this documentation can be transformed into electronic data and used, organized, searched, stored, retrieved, collected and transferred with the strokes of a few keys. Transcripts and written arguments can be provided to judges on diskette. Documents already filed can be gathered and re-used for subsequent court proceedings without the need to re-copy, re-collate and re-file them. Judges, lawyers and administrators can have ready access to them once they have been electronically filed in the court data base.

Here, again, the compatibility of technology is critical.

The electronic exchange of information, including the issuing and filing of



material and access to court calendars or lists, is of added importance in areas such as Northern Ontario where distances from court locations define many of the problems. In many areas lawyers are required to forward their material to agents in the community where the Court is located. The agents attend to the filing requirements and charge the law firms for their services. These costs are passed on to their clients, as disbursements. An electronic environment would eliminate such costs.

Video conferencing is also a technology with great potential for the practice of law in such areas, particularly for motions and pre-trials. There appears to be a general acceptance amongst the members of the Bar to experiment, at least, with the use of such techniques.

In the end, technology will prove to be successful amongst lawyers, administrators and judges when it becomes "user driven", that is, when tangible benefits are seen to occur and the enthusiasm arising from those benefits creates, in turn, broader acceptance of the system. It is important for members of the Bar, the Administration and the Judiciary to develop a shared sense of ownership and responsibility for the development of the kind of "technology environment" which is necessary to enable the civil justice system to function effectively in the modern age, for the benefit of the public. There is much expertise in each of these sectors. It should be pooled co-operatively, rather than employed in a disjointed fashion in order to ensure that systems compatibility is achieved.

The public must be involved as well. A proper technology foundation is a vital element for their civil justice system. The various techniques of modern technology referred to earlier in this Chapter will facilitate the broader dissemination of information about the court system, generally, to the public and enhance their direct communications with court offices. Participation by members of the public in the development of that system, will breed acceptance and support of it.



## **18.5 REVENUE GENERATION, COST SHARING, AND COST AVOIDANCE**

The introduction of technology solutions creates opportunities for revenue generation and for government/private enterprise "partnering" of ventures to implement the technology. It also creates the capacity for significant cost avoidance.

Potential exists for the sale of standardized software applications developed by government, or by government/private enterprise partnerships, to law offices and to large retail corporations, the media, and various credit agencies -- to name only a few possibilities -- to provide on-line access to that part of the court data base which is in the public domain. Such enterprises already resort to the public information in court files for their own business purposes, but must do so through the laborious and cumbersome method of attending at court offices and culling through the files.

In today's manual environment it is very difficult to make the large amount of public information which is contained in court files broadly available. In an electronic environment, however, tracking, locating and distributing information about the contents of files, precedents, decisions and calendar events for a fee -- even by remote fax/modem access -- can become very feasible.

Kiosk and touch tone telephone services can be made self-funding through the implementation of modest user fees.

Service fees can be attached to the use of the system by law firms, either on a per time basis or by way of periodic advance fees for monthly or annual access, similar to the access availability currently provided for by the Automated Writ System regarding executions registered against properties.

With the use of electronic account debiting or electronic deposits, the Government will receive the additional advantage of having its fee revenues deposited

immediately to the Consolidated Revenue Fund. At present there is unavoidable delay in the making of such deposits -- even when done on a daily basis -- where staff are required to make physical bank deposits. When the funds are deposited automatically, and immediately, the additional revenues generated in the form daily interest payments can be very substantial, on a Province-wide basis.

Perhaps the greatest benefit flowing from the introduction of technology solutions to the operation of the civil justice system, however, is that of cost avoidance. Re-thinking the way the business works, and making changes accordingly, can in itself provide financial savings for the system. The introduction of computer and electronic technology, though, has the potential -- in addition to improving service -- to reduce costs relating to paper handling and storage, and relating to the organization of staff, dramatically.

Much of the initial cost of introducing some of the hardware and software applications necessary to create the technology environment we envision, can be blunted, we believe, through government/private enterprise partnerships or joint ventures. Considerable opportunity for revenue production lies in the creation and operation of these systems. Considerable talent and expertise exists in both Government and private enterprise to exploit such opportunities. We believe that there will be extensive interest in the private sector to participate with Government in doing so.

A precedent already exists for this sort of approach in connection with Ontario's Automated Writ System.

## 18.6 CRITICAL NEXT STEPS

### a) Implementation of the Technological Infrastructure

#### RECOMMENDATION

We recommend that the technological infrastructure -- including network systems, hardware equipment, software applications, and provision for adequate training -- be put in place in Ontario to enable the civil justice system to operate on the basis of:

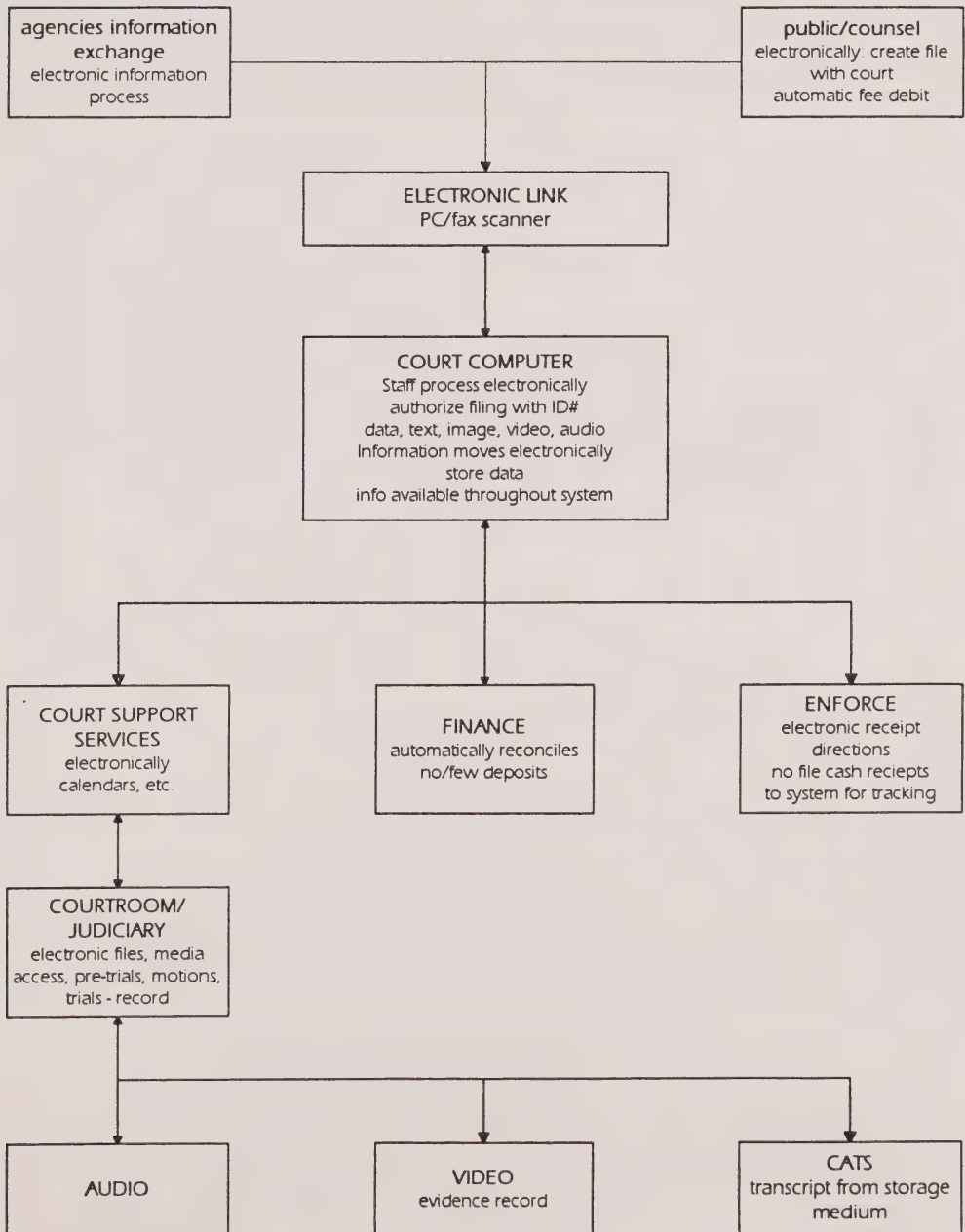
- the electronic filing of documents by lawyers, by members of the public, and by other agencies
- the electronic exchange of information as needed between lawyers, court offices, the judiciary, the public
- the ability to provide data in courtrooms and the ability to provide electronic inquiry
- electronic imaging, to supplement these features
- video conferencing available provincially for specific types of hearings such as motions and applications, pre-trials and case management meetings
- data entry at initial source
- fees paid through automated account debit or credit card
- automated information centres
- kiosk access for the public

Chart 3 is a graphic depiction of the way such a system might operate.

# ONTARIO'S CIVIL JUSTICE SYSTEM

Chart 3

## ELECTRONIC CASE PROCESSING



**RECOMMENDATION:**

**We further recommend that, as part of the implementation program for this technological infrastructure, the Ministry continue, and expedite, its current initiative in the expansion of network facilities across the Province.**

**We recommend that these initiatives be implemented over a period of 5 - 7 years. Planning must include the need for flexibility to accomodate future advances in technology.**

There will be costs associated with this proposal, both with respect to its initial implementation and with respect to the training of personnel which must accompany that implementation. Those costs, however -- as we have pointed out elsewhere -- will be more than offset by savings and by improved effectiveness in the system. They are outweighed by the advantages of proceeding.

Those advantages include:

- remote access by lawyers, members of the public and agencies
- reduction in the volume of paper that must be handled and stored at court locations
- the ability to transfer file contents to courtrooms for use in court, and to other remote terminals where available
- remote inquiry access by users and clients
- reduction in the amount of cash receipts kept on court premises and an increase in the amount of daily interest earned on deposits received by the Court
- reduction of the cost and trouble of cheque production for lawyers
- the capture of ad hoc documents not available in electronic format, using electronic imaging and scanning techniques

- 24 hour access
- video conferencing
- data entry at source, thus eliminating internal data entry by staff and the errors and time delays attendant to that manual process
- remote access to public through kiosks
- automated information centres
- the ability for immediate on-line update of information

At the end of the day, the Court will be more streamlined and effective, and will be up-to-date and compatible with the private sector. It will be in a much better position to be able to continue to advance and to adapt to what is going on elsewhere. This will have advantages not only internally and in its dealings generally with the legal sector, but also in its dealings with other elements in society such as the media.

#### **(b) The Need for a Separate Dedicated Support Team**

Continued support and service are prerequisites to an effective technology system. As the Operating Manager in charge of the software program used in the case management pilot projects has noted:

"Whatever system is chosen or developed, it is important to remember that support for the hardware and software once it is installed is critical. Unfortunately, the systems work does not stop once the system is up and running. There are always problems and changes which require a systems officer's expertise. Therefore planning for ongoing systems support is essential."<sup>168</sup>

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<sup>168</sup>G. Carson, Manager, Operational Planning, Ministry of the Attorney General: Report to the Civil Justice Review regarding the Sustain Software Program, November 1994.



In our opinion the mechanism which is put in place to support and service the needs of the Court's technology infrastructure should be separate from that of other parts of the Ministry, and from that of other Ministries. The support team should be dedicated to responding to and meeting the needs of the civil justice system.

**c) Evidentiary Changes and Changes to the Rules of Civil Procedure**

Changes will be required both in the areas of the rules of evidence and the Rules of Civil Procedure to accommodate the changes to be introduced in technology. These changes will include matters relating to the service, filing and proof of documentation.

They are important.

Equally important is the need to ensure that the reproduction, recording, retrieval and storage technology implemented is accurate and reliable. The reproduced images must be capable of being accepted as authentic and as evidence of the original court copy, exhibit or other document, as the case may be, or as an accurate copy of the original.

**RECOMMENDATION**

**We recommend that a special committee be struck, to work with the Rules Committee, in conjunction with the Implementation Team, to examine these issues and to make recommendations for the implementation of evidentiary and rules changes necessary to accompany the technology changes to be implemented.**

**d) The Need for Training**

We have emphasized the need for training on other occasions throughout this Report. We emphasize it again in the context of this section, because of its importance.

Operational, systems and planning staff cannot function properly in a technological setting without training, nor can the system be utilized to its potential. Both of these inefficiencies lead to inevitable frustration, unnecessary skepticism about the system, and increased costs. Ultimately the expense of training must be incurred in any event.

This, as we have previously noted, is one of the most important lessons to be learned from the case management pilot projects.

Judges, too, must receive training in how to use computers, and in how to use them *as computers*. Otherwise, there is a risk that they will simply become expensive typewriters, or at best expensive wordprocessors. Judges need to receive training which will enable them to use their computers *as tools to enhance their abilities* to preside effectively, to do research, to prepare their decisions, and to manage their caseloads.

Once judges and staff become familiar with the use of computer technology - - and more and more of them gradually become "hooked" on it -- their support and enthusiasm will, in turn, stimulate the better use of technology and, with it, an improved and more effective workplace.

#### **e) Systems Security**

Systems and data security is a major concern when working in an electronic environment, as is privacy of personal data and information. Because of the distinctive nature of the justice system -- and, in particular, the need to preserve judicial independence and the need to preserve the confidentiality of the judiciary's work process -- this concern takes on an added dimension in the context of the court system.

Several levels of security alternatives are now available to preserve system and data security. They include passwords, encryption and partitioning technology, and layers of network and application security.

Continuing and rapidly improving developments in these areas are important. Multi-user hardware systems and software applications, cutting across differing segments of the justice system, are the likely imperatives of the economies of technology. They save duplication of systems and, more importantly, of costs.

Court technology cannot be designed and implemented in isolation from these demands for systems harmonization. At the same time, however, the Court must preserve its independence in the justice system. Can this be done in a multi-user system which, because of the dictates of size, will be driven and controlled by the major litigant in the courts -- the Attorney General and her Crown law officers -- by the police and by correction officials ? Can the security and confidentiality of the judiciary's communication links be absolutely ensured, in such a system?

These questions will require very thorough and careful consideration.

## **18.7 OTHER RECOMMENDATIONS**

Multi-media technology is far too complex and technical for the Civil Justice Review to be in a position to devise specific proposals for the implementation of an appropriate technology infrastructure for the civil justice system. It will be necessary to call upon the expertise and knowledge of people from all constituents in the system for that accomplishment. Much co-ordination and planning will be necessary.

### **RECOMMENDATION:**

We accordingly recommend that a Courts Technology Committee be established with a mandate to develop specific proposals for the implementation of technology solutions for the civil justice system. This Committee should be comprised of representatives from the Judiciary, the Ministry of the Attorney General, the Bar and the Public. It should be ready to release its proposals within a period of 9 months. Its terms of reference will include the following:

1. The Committee will determine the optimum solution for the implementation of technology for Ontario's civil justice system, in accordance with the following criteria:

- the system must be cost effective
- it must support the implementation of caseload management
- it must provide the infrastructure for a new management information system
- it must provide appropriate training opportunities and facilities for users of the system
- it must enhance public access to the system
- it must ensure integrity of the court record
- it must be responsive to the unique needs of the judiciary

- it must be viable into the 21st century
- it must be able to integrate data and process information from all parts of the justice system -- Bar, Bench, Ministry, Police, Corrections and others -- while at the same time not threatening the principles of an independent judiciary

2. The Committee will determine the costs of acquiring the necessary technology, and will identify funding opportunities and develop the necessary business case in support of the required funding.

3. The Committee will work, through a special sub-group, to identify the requirements for an effective management information system, and to develop the means to implement such a system.

4. The Committee will develop a detailed province-wide implementation plan, to be spread over a period of 5-7 years and will work with the Rules Committee to ensure that appropriate changes are implemented to the Rules of Civil Procedure to enable the technological changes to work effectively in practice.

## **CHAPTER 19.1**

### **HUMAN RESOURCES**

The civil justice system is very people-intensive. Its successful operation is dependent upon the co-ordinated and effective activity of large numbers of employees, judges and lawyers. As a Task Force, we have been highly impressed by the dedication and capacity for work demonstrated by each of these groups of people. We believe that with the innovations that we are proposing they will be able to work, not harder but, more effectively in their individual efforts.

A great deal has been said throughout this First Report about human resources and about how they may be more effectually utilized and managed in order to maximize their contribution to the system and to permit people to make that contribution in a fulfilling way. We will not repeat those observations here. However, a few additional comments are in order.

#### **Court Staff**

Much of the work performed by staff is highly manual.

A document for use in a civil case, for instance, must pass through many hands and across many desks. It has often been said that this type of work can be quite mindless, with very little value added by the employees who may have to stamp documents, enter a piece of information in a record book, or check material for adherence to the Rules. This processing activity is very time-consuming, and many employees have questioned the wisdom of perpetuating it.

Given the significant number of parties that need to see case documentation and the vast number of pieces of paper that may need to be part of the court file, large components of our valuable resources are consumed by repeatedly processing



and storing this information. This sort of activity entails a large cost to the government for employees, as well, to say nothing of the costs associated with storing files and using valuable courthouse space.

It became readily apparent throughout our consultation phase that court personnel are extremely committed to supporting the justice system and want a meaningful role in the administration of justice. Their knowledge of the system could be better used if the many labour intensive manual processes which absorb their current energies and time are replaced with re-thought approaches to those processes and automation to support filing and information management.

Staff in the courthouses across the province want to serve the public better. They feel that there are inherent inefficiencies in the system which cause delay and cost to litigants. As well, staff would like to assist in better informing the public about the court process and the staff's role in the system.

Most court office employees only participate in a limited part of a case moving through the system. Very often, they have little awareness of the whole system and how their piece of the process forms part of the ultimate resolution of the case. Much of the literature dealing with the management of human resources describes the potential for improved productivity when employees feel some ownership and sense of accomplishment as part of a team that has accountability for an entire product.

One of the greatest challenges facing us as the proposed changes in this Report are implemented will be their impact on staff resources. Training and redeployment plans must be developed to manage the transition inherent in the work that employees will be performing in a full case flow management environment. Rather than being focused simply on the movement of paper and files, staff support will be critical to the movement of cases through to resolution by aiding the judicial

teams in managing the workload and the adherence to time standards and procedures.

Development of the human resource strategy will require input from employees, from their labour representatives, and from human resource specialists in government. Job specifications will have to be written, training modules developed, and opportunities to compete for these realigned functions will have to be provided to the court office personnel affected by the proposed system changes.

The realignment of the financial and human resources will be very much dependent upon our ability to eliminate unnecessary functions and duplicative procedures currently endemic in the system, through automation and the re-thinking and streamlining of the administrative processes, as we have proposed. We believe that the needed resources can be freed up for reallocation and financing of the new system which calls for case managers and judicial support officers.

The dictates of policies of restraint, of the social contract and of policies of redeployment, when implemented in the unique context of the justice system have had a negative impact upon service. The principles of implementing these current strategies must be reconsidered in light of the growing imperative for well-trained, well-managed and more sophisticated professional administrators in the system.

## **The Bar**

Our proposed changes should ease the current burden on lawyers who are pressured by their clients, by the complexities of the system, and by too much paper. We know from representations by the bar that lawyers are sympathetic to the concerns of court staff and the environment in which they now work. They also support the need for well-trained, well-managed and more sophisticated professional administrators.

## **The Judiciary**

Much has been said about the role of the judiciary in this First Report -- the need for an independent judiciary, case management, our concept of the judicial teams, circuiting and judicial support officers, for instance. We will not dwell on those aspects of the Report here again.

Judicial resources will need to be considered in another context, as well, however. We have learned that there has never been any standards by which to establish the appropriate level of judicial resources needed for each Region or for the Province as a whole. The team approach and the introduction of judicial support officers within a caseload management system could have significant impact on judicial workload. It is important that a criteria be established for determining the appropriate level of judges and the allocation of these resources.

This has never been done in Canada, and indeed, we have been able to find very little research on the question in other jurisdictions. Although this is a time of limited fiscal envelopes, this issue will need ongoing careful consideration. We hope to be able to address this matter in our Final Report.

## **CHAPTER 19.2**

### **EFFICIENCIES**

Throughout the Consultation phase of the Review, suggestions were made which focused on various practical efficiencies that could be introduced into the system to promote the more effective use of current resources. Many of these, we wish to emphasize, are precisely the kinds of proposals that are essential to the reallocation of our resources if the demands of the new civil justice system are to be met successfully.

A number of these suggestions have been dealt with and developed in previous sections of the Report, and we will not repeat those here. For reference purposes, however, we note the following examples:

- the introduction of technological efficiencies (Chapter 18.1)
- a caseload management system that minimizes paper intensive administrative support (Chapter 13)
- impact studies for changes to legislation, Rules, regulations and practice directions (Chapter 19.5)
- a streamlined record-keeping system (Chapter 15)
- the re-examination of service requirements (Chapters 14 and 18.1)
- opportunities for the private sector to play a role in service of documents and examinations for discovery (Chapters 13.7 and 13.10)
- the more efficient scheduling of motions (Chapter 13.8)

There are a number of other practical efficiencies which need to be examined separately.

**Court Staff Scrutiny of Documents:**

In almost every General Division court office, counter staff review documents that are filed in order to ensure compliance with the Rules of Civil Procedure and the local practices of the court.

This practice fulfills an important function from the judiciary's perspective in that it improves the quality of the materials finding their way to judges, thus minimizing the amount of time they must spend dealing with materials that do not conform to the Rules. On the other hand, it is a practice which provokes a great deal of frustration on the part of court staff, who must spend a great deal of their time reviewing such documents, and who feel -- with some justification, if our consultation phase is an accurate measure of the situation -- that they are frequently being asked to spend time correcting matters that are the lawyers' job to get right in the first place.

We recognize the legitimacy of this frustration.

Another difficulty arises because the degree of staff scrutiny of documents is uneven and varied across the Province. This variation engenders frustration on the part of the lawyers, who have to deal with different scrutiny practices.

Frustration, and the strain on relationships that it creates, are not the only consequences of these difficulties. They lead to additional costs to clients, the public, and lawyers. And they lead to significant additional administrative costs.

It is important to detect problems in documents at an early stage. It is also important, however, to develop principles of consistency and to utilize scarce human resources effectively. These factors must be balanced.

We believe that the creation of a protocol regarding the examination of court documents would be helpful in addressing this problem.

## **RECOMMENDATION**

**We recommend that representatives from Courts Administration, the Judiciary and the Bar develop a protocol with respect to the examination of court documents by court staff, and that the protocol be communicated to all court offices in the province and be applied throughout the province.**

### **Flexibility in Filing Court Documents**

Currently, Rule 4 of the Rules of Civil Procedure requires that all documents which need to be issued must be filed with the court by personal attendance. Any other document can be filed by ordinary mail. Many court offices and particularly those operating under the Case Management Rules have allowed for some flexibility in filing through the use of facsimile transmissions.

The expanding use of other methods of delivering correspondence and documents, such as through courier services and by means of electronic filing, should also be taken into account. We see no reason why the process of filing documents with the Court should not be adapted, where appropriate, to these evolving methods.

## **RECOMMENDATION**

**We recommend that the Rules Working Group of the Implementation Team consider the development of broader and more flexible approaches to the filing of court documents.**

### **Examinations for Discovery in Court Offices:**

Rule 34 of the Rules of Civil Procedure provides that, unless there is an agreement between the parties, oral examinations for discovery must be held before an "Official Examiner". The duties associated with this responsibility often fall to the



local court office. Over the years, qualified private court reporting services have been established in many areas of the Province, however, thus diminishing the need for such services to be provided through court offices. The Ministry decided to phase out this role in the court offices.

There still exist, however, court-connected facilities for these oral examinations. If the requirement for consent were removed, the court would be able to withdraw from this service, subject to the availability of properly qualified private-sector facilities for the production of reliable transcripts .

## **RECOMMENDATION**

**We recommend that steps be taken, through the Rules Working Group of the Implementation Team, to minimize, and eventually to eliminate, the practice of examinations for discovery being held in court office facilities, in those locations where properly qualified private-sector reporting services are available.**

### **Decision-Making Authority:**

A number of suggestions focused on the need to conserve judicial resources.

In the context of the proposed caseload management structure, with its judicial and case management teams, we believe that certain functions traditionally allocated to the judiciary, or to quasi-judicial officers, can be effectively dealt with by case management co-ordinators *where there is consent*.

These are enumerated in the following recommendation.

## **RECOMMENDATION**

**We recommend that, where there is consent to the order being requested, case management co-ordinators be authorized to dispose of the following matters:**

- **amendments to pleadings (in addition to the Registrar's existing powers in this respect)**

- **additions/deletions/substitutions of parties**
- **change of solicitors of record**
- **setting aside default judgements**
- **discharge of certificates of pending litigation**
- **requests for security for costs in specific amounts**
- **certain discovery related motions**

## CHAPTER 19.3

### COURT FACILITIES

Courthouses and court facilities are an integral part of the administration of justice. They are symbols of the presence of justice in the community, and they provide the physical space from which justice is made available to the public.

Court facilities are important from the perspective of all groups involved. The adequacy and accessibility of court accommodation influences the public's perception of the quality of justice being dispensed. A significant portion of a court administrator's time is spent maintaining, improving, and reorganizing limited court space. Judges and court staff must live daily with the working conditions created within this space. Finally, the Bar looks upon the courts as a place where they need to conduct case - related business of all kinds.

The state of court accommodation in Ontario has been the subject of comment in a number of Reports in the past quarter century. The McRuer Report (1968), the Ontario Law Reform Commission report on the Administration of Ontario Courts (1973), and the Zuber Report (1987) all did so.

The Zuber Report included the following specific recommendations:

- (1) that all new courthouse designs be based on the model of a consolidated courthouse, and that, to the extent possible, current facilities should accommodate all courts and court offices;
- (2) that remote centres should be served by itinerant satellite court operations, with permanent Provincial satellite courts in the smaller centres of Ontario;
- (3) that resort to ad hoc accommodation should be kept to an absolute minimum where there are permanent court accommodations;

- 4) that a standard set of courtroom and courthouse designs be created to be used whenever new facilities are to be built or present facilities are to be renovated;
- (5) the courthouses should be designed to ensure that judges and jurors have secure access to the courtrooms and that accused persons also have secure but separate access to the courtrooms from the holding areas;
- (6) that public spaces in courthouses should be maintained and not renovated into courtrooms and offices; and,
- (7) that courthouses should be well signposted, with information pamphlets available for public use.

Following the Zuber recommendations, standards for courthouse construction and courtroom space and facilities have been developed. New courthouse construction is based on a consolidated model and current court operations have been merged to the extent possible in the space provided. Resort to ad hoc accommodation has been reduced. Draft designs and actual court mock-ups have been used in wide consultation processes for proposed courthouses. Moreover, courthouses visited by the Review were observed to have information shelves with pamphlets in both official languages.

In the seven years since the release of the Zuber Report, however, the pressures on courthouse and courtroom space in Ontario have grown. The Supreme Court of Canada's decision in Askov -- directing that criminal charges must be disposed of within certain time parameters -- has resulted in the prioritizing of criminal cases on trial lists. In some areas of the Province, this has had a significant impact upon the availability of resources for civil matters. The backlog of civil cases awaiting trial has grown. Security for courthouses has been transferred to the Ministry of the Solicitor General through local police departments. Changes to the processing of cases have been made in pilot projects such as the case management sites and in technology, as in the automated writ system.

In March, 1994, The Coopers and Lybrand Consulting Group completed a study of the Toronto Courts for the Ministry of the Attorney General and for Management Board of Cabinet. The study included a Master Plan, Functional Planning Documents, and an implementation program for court facilities for the next twenty years. This Study cited severe drawbacks in the current courthouse facilities in Metro Toronto, including:

- overcrowding
- lack of specialized spaces
- poor security
- poor air quality, acoustics and lighting
- lack of sallyports
- lack of features for handicapped accessibility
- poor temperature control
- substandard working conditions
- significant barriers to the efficient application of case flow management, to the ability to adapt to re-thought processes, and the flexibility for implementation of new technology
- insufficient jury and public waiting areas
- lack of space for expansion
- a continued threat of severe problems due to increasing case backlogs.

Most of the buildings, the study reported, could not be upgraded to Treasury Board and Building Code standards and for those that could, the cost would be prohibitive.

The Metro Courts Study made a number of proposals for courthouse and courtroom development in Metro Toronto. Without reviewing them in specific detail the study recommended:

- either four or five new buildings should be constructed, depending on which of the several options put forward were accepted
- the following criteria should be applied to evaluate the possible options:
  - quality of service
  - cost effectiveness
  - customer service
  - quality of workplace environment, and
  - ability to accommodate uncertainty.

The Civil Justice Review agrees with these criteria and encourages the Government to proceed with the plan put forward by the Metro Courts Study. The Review has also been advised of several other large facilities initiatives which are underway in Hamilton, Brampton, Windsor and Cornwall.

It is imperative that current and future plans for court accommodation take into account the changing needs of the civil court system, as outlined in Chapter 13 and 18.1 of this Report. For example, a complete infrastructure for technology to enhance all possible efficiencies is urgently needed. Meeting and motion rooms need to be made available. Secure working space for judicial and administrative decision-making teams should be built in such a way as to support the process. Courtrooms should be kept available for trials. Public areas need to include adequate public and private meeting space, particularly in light of recommendations that clients be more included in pre-trial settlement activities relating to their cases.



## CHAPTER 19.4

### FUNDING

The civil justice system must be properly and adequately funded. This a central theme of our Report, and one which has been touched upon many times throughout.

"Funding" is a difficult and elastic concept, however. How, and in what form and quantities, resources are to be allocated to the civil justice system in order to ensure that it is "properly and adequately funded", is much mooted question. It is a question, though, which cannot be accurately assessed and answered until the structures, the systems, the management techniques and the human resources are in place to ensure the system operates in as "effective" a fashion as possible. At the same time, the system cannot be re-thought and re-structured to allow this to happen without the allocation and re-allocation of appropriate funding. Weighed in the balance in this debate must be the reality that there are many intangibles in the justice system and that, in the end, the system must function in a way that is accessible, fair and just.

One aspect of the mandate of the Civil Justice Review is to,

consider the way in which resources are allocated to the justice system and the criteria upon which such allocation is based, whether the appointment of additional resources is needed and justified, and in what ways existing resources can be effectively re-allocated and re-aligned.

The overall theme of this, our First Report, is to outline our "vision" of the way in which the civil justice system should be re-organized, restructured and retro-fitted for the 21st century. We have set out, in summary fashion, the way in which we believe that "existing resources can be effectively re-allocated and re-aligned". Clearly there is much more that needs to be done to settle upon the ultimate way in which resources should be allocated to the justice system, the criteria upon which

such allocation should be based and whether, and to what extent, additional resources may be needed or justified. These issues will continue to command our attention during the implementation stage and the consultation and research phase pending our Final Report.

In the meantime, however, we believe that the practical efficiencies which we have identified and the proposals that we have made will result in savings to the system. The first goal is to use the funds saved from these efficiencies and changes to finance from within the new, streamlined and cost-effective structure which we have put forward. In this sense, the reallocation of current resources is hoped to be the primary source of funding for those changes.

With the exception of technology, the efficiencies and savings that we have referred to will not be sufficient to fund *both* the new structures and processes we have proposed *and* the implementation of the necessary technology infrastructure to support them.

We believe, however, that an investment strategy in technology will reap benefits in itself, and that such a strategy is not only a necessary one, but also a sound one. Immediate benefits can be gained from the operational changes that technology will bring, and technology initiatives will pay for themselves, both in the form of short and long term savings and in the form of costs avoided. An investment in new funding will be required at the front end for its implementation, but we are satisfied that the business case can be made for doing so.

The members of the Civil Justice Review are acutely aware of, and sensitive to, the current climate of fiscal restraint and constraint. As part of the strategy for taking an overall look at the question of how resources are allocated to the civil justice system, however, it is imperative that further restraints not be imposed on the funding available to the Courts Administration Division of the Ministry of the

Attorney General. To impose such further cuts at this juncture of the Review's efforts could severely jeopardize our work and would seriously erode the integrity of the entire system.

A momentum is growing and a will for change coalescing. This momentum and emerging will had begun to formulate before the establishment of the Civil Justice Review, through the umbrella efforts of the Joint Committee on Court Reform and through the various initiatives that are outlined in our Terms of Reference. Furthermore, the Civil Justice Review process has proved to be a remarkable catalyst in itself. Representatives from the Public, the Bench, the Bar and the Ministry are working together, seriously and decisively, to collaborate on solving critical and pressing issues in the court system. Together they have accepted a shared responsibility for the system, and have committed to working together on solutions.

We must seize the emerging opportunities and protect existing resources for the realignment needed to implement the new process. We act at the public's peril, if we do not.

## CHAPTER 19.5

### THE IMPACT OF CHANGE

We were reminded on numerous occasions during our consultation phase of the tremendous impact upon the courts and upon the entire civil justice system made by new legislation, new regulations, new rules (and even new practice directions) -- and by changes in existing laws of that nature. Very little, if any, advance analysis appears to be done to gauge the impacts of such action on the administration of justice.

At the same time as the system is finding itself squeezed for resources, demands on the courts and the justice system as a whole resulting from a plethora of "law-making" initiatives, are expanding, almost exponentially. Family law legislation, consumer legislation, tenants' rights legislation, environmental legislation, corporate-commercial legislation, class action legislation, regulatory legislation in general, and a host of other rules and regulations -- not to mention the Charter of Rights and Freedoms -- have all placed enormous and growing strains on the system. The former dean of Stanford Law School, Dean Bayliss Manning, called this explosive phenomenon "hyperlexis", by which he meant "the pathological condition caused by an overactive law-making gland". He noted, in this connection:

Measured by any and every index, our law is exploding. New statutes, regulations and ordinances are increasing at geometric rates at all levels of government. The same is true of reported decisions by courts and administrative agencies. Whole new legal fields spring into being overnight, such as environmental law; older fields like property are experiencing infinite fission. Statutory codes .... are becoming more particularistic, longer, more complex, and less comprehensible. **We are drowning in law.** (emphasis added)

We believe that in the midst of this maelstrom of expanding law, it is imperative that consideration be given -- in a systematic way and in advance -- to the impact that proposed legislation and regulations of all kinds will have on the courts, the judiciary, and courts administration and costs for the public.

One area which needs to receive as much attention in this regard as others relates to rules and practice changes. What may be considered by the rulemakers or the drafters of practice directions to be minor changes can impose significant demands on administrative staff, on the utilization of facilities, on judges and on the bar. We became increasingly sensitized to this point throughout our consultations because it was driven home to us on a number of occasions by both administrators and members of the bar. If not considered in consultation with all concerned groups, rules may be varied to cure some ill, but create three or four other "ills" in the process.

We must be mindful of the accompanying cost of these impacts, which must either be absorbed by the system -- either in the operations of the courthouse or the lawyers' offices, or both -- and passed on to the litigant and the public. They are a drain on Legal Aid funding as well.

**RECOMMENDATION**

We recommend that legislators, regulation-makers, rule-makers and authors of practice directions be required to conduct "impact studies" (including research and appropriate consultation) on the effect of proposed changes and initiatives on judicial, administrative and legal resources before implementation of the proposed changes or initiatives.





## COMMUNICATION

### CHAPTER 20

#### ACCESS TO INFORMATION AND PLAIN LANGUAGE

The public's ability to have ready access to the civil justice system is affected not only by factors such as cost and delay but also by its ability to comprehend the process. Lack of understanding and knowledge lead to misunderstanding and a sense of alienation from the process.

The law is complex and the processes which must be followed to obtain redress under the law can be even more so. Information about the law and its procedures, and about the range of dispute resolution options that exist, needs to be as readily available and as easily understood as is practicable in a complex society. Meaningful access to civil justice will never be a true reality unless this is so.

While the inherently complex nature of the law -- which must seek to govern the full array of society's infinitely complex human relations -- may normally require an individual to seek professional advice, we were told repeatedly by lawyers, as well as the public, that the civil justice system is *too* complex.

Members of the general public are perhaps less informed about aspects of the civil law and procedure than they are about criminal proceedings, which enjoy greater coverage in the media. Public perceptions of the civil justice system are also coloured by distorted or inaccurate presentations of court proceedings that are depicted in films or television programs. Currently, civil law courses are offered only on a voluntary basis in Ontario High Schools. At the University level, law courses are primarily reserved to law students. As a result, many members of the public grow into adulthood with very little information about the justice system, and about the civil justice system in particular.

The need of members of the public to know about civil justice matters often arises only when they have occasion to become involved in a matter which forces them into it. At that point, the immediate pressures of the dispute and the litigation surrounding it tend to fashion their views and impressions of the system. Frequently, because of the personal, emotional and financial pressures which characterize the circumstances, those views and impressions are not positive. With little general knowledge or appreciation of the system, and no overall perspective, negativism easily becomes the prevailing attitude toward it. The administration of justice suffers, as a result.

We believe that there is a growing need in society for an educational foundation that includes more exposure to civics and to the purposes and processes of the civil justice system and the values underlying it.

## **RECOMMENDATION**

**We recommend that the Ministry of Education, elementary and secondary schools, universities and community colleges play a greater role in the education of the public with respect to the purpose, values and processes of the civil justice system.**

Some information is available to the public.

The Ministry of the Attorney General provides a number of pamphlets and brochures, but these tend to be limited in their scope. The most well received of these is an informative booklet dealing with Small Claims Court matters. We see no reason why such a brochure could not be duplicated and made available for General Division matters.

The Law Society offers a number of brochures -- including one about how to retain a lawyer -- and a Dial-a-Law program which provides information on a number of legal services. Statutes and other legal publications can be purchased at

government book stores, where these exist. There is an apparent lack of co-ordination of these activities, however. For instance, the Law Society brochures are not available at courthouses throughout the Province. There is no common source of information.

We are concerned about the lack of available information, published in plain language and a format that a layperson can understand, which will assist the public in appreciating how the courts work, how to proceed with a case in the Ontario Court of Justice (General Division), how to find and retain a lawyer, and how to do anything that relates to the justice system.

In our opinion, there is a need to keep the process as simple as possible and, just as importantly, to offer information in plain language about the process of civil justice, about how to obtain the necessary assistance to use the process, and about the spectrum of dispute resolution options which are available to help individuals resolve their problems.

For matters involving small claims, the Ministry of the Attorney General has published a brochure entitled "How to Make Small Claims Court Work for You". It is a straightforward step-by-step guide to making or responding to a claim, written in plain language, containing simple answers to obvious questions like how to obtain an adjournment, what to do when arriving in court, and options regarding enforcement. In Small Claims Court matters, court staff are permitted to provide assistance to the public concerning the "how to's" and other related matters. They are not permitted to do so in General Division matters. This can lead to the absurd situation where two people standing at a court counter side-by-side -- one with a claim for \$5,999 (just below the Small Claims Court limit) and one for a claim of \$6,001 (just above the limit) -- receive different treatment. As well as causing embarrassment and difficulty for the court staff, this sort of situation simply adds to the frustration of the public and leads to their further disenchantment with what is supposedly their system of civil justice.

The culture of the courts must change to reflect the principle of service. The public, which funds the system with hard-earned tax dollars and pays hefty legal and court fees, has a fundamental right to access to it in a timely, affordable and comprehensible manner. People should not be intimidated by the court system. They need to understand it. Language needs to be simplified and information about the process made more easily available.

#### **RECOMMENDATION:**

**We recommend that community based information services be developed through a partnership between the bar, the Ministry and legal clinics. The information available should be in "plain language" which is readily understood by general members of the public, and it should be available in a variety of forms -- e.g. written brochures and materials, interactive computer terminals, video cassettes and audio formats -- in order to facilitate a broad distribution of information in locations other than courthouses and at times other than regular office hours.**

The Ontario Government has recently announced a customer service initiative to develop a self service kiosk network across the province. It is intended to be an alternative delivery channel for clients wishing to access government products and services. These kiosks will be primarily located in shopping malls and busy government offices in the more densely populated areas of the province. This network could be used to deliver a variety of legal information services.

#### **RECOMMENDATION:**

**We recommend that the Ministry participate in the Ontario Government's Kiosk Program as a method of disseminating information about legal processes more broadly to the public.**

In Small Claims Court, in Provincial Division Family Law Proceedings and in Landlord and Tenant matters, proceedings are commenced through the use of generic "fill-in-the-blank" forms. Court staff in these court locations are generally available to provide information and assistance to the public in completion of the forms.

As we noted in Chapter 14 of this Report dealing with the Rules of Civil Procedure, the Rules which govern proceedings in the General Division are designed to be read by professional users and are only available from legal publishers at a significant cost. In General Division matters, prescribed forms are not available to the public and can only be obtained from legal stationers. This presents a barrier to litigants who wish to represent or inform themselves. For those persons who are persistent and can obtain a copy of the Rules, the language used is not designed for the uninitiated -- as we have noted before.

It would be naive to suggest that the Rules of Civil procedure could be readily transformed into a "do-it-yourself" manual. There nevertheless must be better information for those who try to understand and make use of the process.

#### **RECOMMENDATION:**

**We recommend that legal forms for use in the General Division be made available at court locations. In connection with this service, we recommend as well the creation of a "plain language" guide to the steps in a legal proceeding along the lines of the presently published Small Claims Court guide.**

As a result of the scarcity of available information, members of the public are frequently forced to rely on court staff for free information. Not infrequently, this places heavy demands on court staff to provide the answers to the public's questions. *Court staff can provide information only but cannot provide legal advice*, something only lawyers are qualified and entitled to do. The distinction between information and



advice can often be a fine one, however, and may not be fully understood by either the staff person or the customer. Along with alternate information service models, better training for counter staff in making these distinctions is required. Customer service initiatives are being put into place in the Ministry of the Attorney General at this time.

#### **RECOMMENDATION:**

**We recommend that, as part of the Ministry of the Attorney General's customer service initiative, a guide for counter staff be developed to clarify for them what is permissible information about the legal process for them to impart to the public.**

Access to court process information is an issue for the Bar in certain respects, as well. We were advised, in particular, of problems arising from inconsistent court practices from one location to the next.

There are undoubtedly valid reasons for some flexibility and adaptability in procedures to respond to local requirements. On the other hand, it is important for the court users -- both professional and unrepresented -- that there be as much consistency as possible across the Province. The Bar was particularly critical of local variances in practice, emphasizing the increased expense that must be borne by them and/or their clients where a step in a proceeding is postponed or recommenced due to non-compliance with an unknown local "rule".

There is a need for clear, and easily accessible, communication where there are local variations in practice. The Bar and Court Administrators expressed special concern with respect to practice directions, which in the past have apparently been introduced by the Judiciary on a local basis without prior consultation. To meet this concern, the Rules have been amended to ensure that such directions are approved by the Chief justice and that they do not come into effect until published in the

Ontario Reports.<sup>169</sup> Ideally, these practice directions should first be developed through discussions at the local bench and bar committee level, with input from the court staff.

It might be useful to track these local practice needs as they may be symptomatic of deficiencies in the current rules. To ensure that there a better awareness of these, they should be communicated to the Regional Courts Management Advisory Committees.

### **RECOMMENDATION:**

**We recommend that Regional Senior Justices be careful to ensure that local practice directions are put into place after appropriate consultation with Bar and Courts Administration representatives, and in accordance with the provisions of the Rules. In addition, copies of the practice direction should be provided to the Regional Courts Management Advisory Committees, to ensure broad publication and knowledge of their contents.**

We received very little commentary regarding the adequacy of French language services in the court system. We note the requirement for these provided in section 126 of The Courts of Justice Act. Every litigant who speaks French is entitled to a bilingual proceeding and a judge who speaks English and French. This Act also outlines the specific counties, territorial districts, and regional municipalities in which documents can be filed in either Official Language and in which jury trials must be available in French and English. We are aware, however, of the September 1994 report prepared by Professor Marc Cousineau for the Ministry, entitled "The Use of French Within the Ontario Judicial System: An Unrealized Right" and understand the concerns raised by that Report. We hope to learn more about these important issues and to respond in our Final Report.

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<sup>169</sup>Rule 1.07



**PART IV**

**IMPLEMENTATION STRATEGIES  
AND  
MOVING TOWARDS A FINAL REPORT**



## CHAPTER 21

### INFORMATION STRATEGIES AND MOVING TOWARDS A FINAL REPORT

#### 21.1 What We Have Learned

The Civil Justice Review has been charged with the task of providing practical, implementable solutions to the problems plaguing the civil justice system. We have consulted broadly in exercising this mandate, and what we have heard is a clear call for leadership and for restructuring.

We have learned a great deal.

In this, our First Report, we have set out our concept of an integrated civil justice system for the future, and identified specific issues which must be addressed to make the system responsive and compatible with the principles guiding the review.

Those principles are:

- fairness
- affordability
- accessability
- timeliness
- accountability
- efficiency and cost-effectiveness
- a streamlined process and administration



We believe, after our lengthy and broad consultation phase, and after assessing the needs of the civil justice system measured against those guiding principles:

- a) that a system of clear and accountable processes and procedures is required;
- b) that a firm understanding of the roles and responsibilities of the participants in the system is critical, as is a commitment to support those roles;
- c) that a realignment of existing resources to support the proposed structure will be needed, along with appropriate accountability mechanisms, to ensure that the new structure remains true to the guiding principles outlined above;
- d) that greater and more meaningful public participation in the system is necessary;
- e) that information and user-friendly tools to facilitate informed access to the system must be provided;
- f) that the investment in, and the implementation of, a technology infrastructure will be a significant force for change, and will aid in achieving greater efficiencies to allow for the realignment of resources; and
- g) that the design and development of a single structure of accountability and responsibility for the overall management, administration and budgeting of the system -- which ensures meaningful involvement from the Public, Bar, Bench, and Government -- is essential to advance the agenda for change which is sweeping the justice system.

In our recommendations we have attempted to formulate and assign some priorities to the structure of the proposed system, to its organization and management, and to the allocation of resources (human, physical and fiscal). We have done this with a view to placing the civil justice system in an optimal position from which it can respond to, and reflect, the ever-changing realities of public policy

and justice administration. If we can lay a solid foundation for an operational base to the system, where people understand the policies, rules, and procedures which govern -- and apply to them -- and in which the support systems are properly aligned to ensure efficient and effective functioning, then we believe the public will be provided with the highest quality of justice and service that the system can deliver.

## **CHAPTER 22**

### **PROCESS FOR REVIEW AND APPROVAL**

This is our First Report. A Final Report will follow later.

Much remains to be developed and accomplished, however, and we have no illusions that our recommendations will go unquestioned, or even unchallenged, in some quarters. There is no doubt much has to be worked out in the details and in the implementation of our proposals. Some matters, as we have noted elsewhere, have been left to be dealt with almost entirely in our Final Report. Others will require more consideration and evolution. Some, on the other hand, should be implemented immediately.

We anticipate that after this First Report is presented to both the Chief Justice and the Attorney General, there will be a period of further consultation, review, analysis, discussion and response.

While we are confident in our recommendations and hope they will be adopted for action, we welcome all comments and responses. The Review will be pleased to meet once again with representative groups from the Community, as we did in the Consultation Stage, to receive their comments and responses to the Report.

We have concluded already that, as part of the implementation phase, a conference like the Geneva Park Conference should be convened for several consecutive days -- again to be attended by senior representatives of the Judiciary, the Ministry and Courts Administration, the Bar and the Public --to begin the process of implementation and working toward the Final Report. We look for this group to reconvene in the Spring of 1995.

## **CHAPTER 23**

### **IMPLEMENTATION**

The process of implementing the recommendations made in this First Report, will require significant effort from the major participants in the system. A team of dedicated personnel will be needed to develop a detailed implementation plan and to support the justice system leaders in effecting the changes within their spheres of responsibility.

We have very clearly heard the advice that the introduction of Case Management will have greater success and acceptance if the backlog has been cleared up, and the court can begin with a new inventory which will be subjected to the rigour and rules of the new system. Therefore a plan must be put in place, with the allocation of the needed resources, to tackle the backlog. The current downward volume trend of cases filed in the court provides a unique opportunity to phase in the Case Management process while at the same time clearing up the backlog. However, there are not sufficient resources (physical, human, or financial) to attack the backlog simultaneously everywhere across the Province.

Therefore, we have proposed that a dedicated team of individuals drawn from the Court and from senior members of the Bar, if necessary, should be deployed, one Region at a time, to eliminate the backlog. Concurrently, those Regions would be provided with the training and realigned resources necessary to introduce the new system and protocols.

However, the success of this strategy will be highly dependent upon the overlay of a province-wide technology investment in support of the new system. A team of highly-skilled technology experts and justice system experts will be required to design and build the technology infrastructure to support case management and the court process.

The Ontario Government is in the process of creating an integrated justice technology, to be put in place throughout the entire justice system. This is an exciting development. It will involve generating a strategy that will facilitate a telecommunications network, that will promote better information management, that will introduce electronic document transfer and interaction, and that will provide more public access tools.

It is vital that an integral, leading part of government strategy include technology planning and development for the civil justice system, in order to ensure timely and comprehensive implementation of the proposals that we are recommending.

In addition, the number of changes that are contemplated in our recommendations mean that specific, detailed attention must be focused upon the changes that will be required to the Rules of Civil Procedure. Thus it will be necessary to convene a special team of justice experts to draft the necessary Rules changes. These changes will be necessary, in particular, to support case management policies and protocol, and to accommodate the impact of new technologies such as the electronic filing and transfer of information, service of documents and information, the use of "touch screen" technology in kiosk and other settings, video conferencing technology, etc.

The secret to the momentum which has been created by the Civil Justice Review process to date has been the sense of shared participation and responsibility for the management and operation of the system which has been engendered by those responding to it. Similar characteristics will be necessary to carry the day in the Implementation Phase. The composition and membership of the Implementation Team, and of the Working Groups dealing with its sub-projects, should mirror that of the Task Force, in terms of constituencies represented, if not in actual personnel, as much as is practically possible. At a minimum, the implementation process should

be overseen by an Implementation Team appointed by the Chief Justice of the Ontario Court of Justice and the Attorney General, which includes members of the Public and representatives of the Judiciary, the Bar and the Ministry.

It is vitally important that dedicated resources be allocated for the enormous planning which will be required leading up to and in the course of the Implementation Phase. Successful implementation will strongly depend upon such an allocation of dedicated resources. It will also depend upon the committed participation of representatives from the major constituencies about the system -- the Bench, the Bar, Courts Administration and the Public, and upon their dedication to withstand the planning cycle.

### **Implementation Issues**

The following is an outline of the various issues and specific projects which must be addressed during the implementation phase. They serve to highlight the significance and extent of the change contemplated by our proposals:

### **Technology**

- costs/investments required
- software applications: do we develop our own system or acquire one from a supplier?
- training for staff and judges
- compatibility of hardware with Government and Ministry standards
- timeframe and approach to installation and software application development
- development of video technology process and activities



**Budgeting and Approvals**

- analysis of costs for each project
- determination of investment costs, ongoing operating costs and potential for realignment
- central agency approvals for funds, workforce impacts and technology requirements
- determination of Federal Government participation in financing changes

**Human Resources Strategy**

- determination of and planning for training needs
- development of new job descriptions
- workforce plan in collaboration with employee groups
- restructuring of courts administration organization to support new processes
- compatibility with human resources policies such as redeployment, surplus assignments, employment equity, etc.

**Rules**

- analysis of changes required to existing Rules of Civil Procedure to accommodate new requirements
- need for quick turnaround on Rules and necessary approvals
- establish special team dedicated to drafting new Rules
- schedule of implementation
- educational tools to ensure comprehensive understanding of new procedures, time standards, etc.

### **Communication/ Public Education Strategy**

- plan to advise public and justice community of changes
- development of plain language materials for public that explain dispute resolution process
- support-kits for public accessing court services for first time
- user-friendly access to information and processing of disputes
- support and education responsibilities for public participants in Courts Management Advisory Committees

### **Backlog Elimination**

- development of Region-by-Region plans for backlog elimination
- identification and assignment of resources
- determination of time backlog

### **Introduction of Case Management**

- development of plans by Region to introduce new processes and team concept
- education of Public, Bar and Bench
- availability of technology, trained staff and new Rules

### **Family Group**

- effective cost measures
- resources for supervised access, mediation, assessments, and all counselling
- education for the Public (including early education in the schools), the Bar, the Bench, and Administrative Staff
- information services about court proceedings in each courthouse

- legal aid certificates regarding specialized practitioners
- adequate facilities for Northern Ontario
- resolution-focused process piloted in proposed sites
- changes to the Originating Notice of Application
- early judicial intervention including determination of whether a summary process is required
- availability of Alternative Dispute Resolution resources under judicial supervision
- availability of the full range of electronic, video and tele-conferencing technology, especially in Northern Ontario
- options for purely uncontested divorces at low-cost without judicial intervention
- changes to the Family Support Plan
- continued monitoring of implementation issues

The timeline for completion of the implementation plan will be contingent upon the timeline for approvals of the directions and resource requirements necessary to carry out the project. We estimate that establishment of the Implementation Team and recruitment of its project director could be achieved by June 1995. An overall project plan and timeframe will need to be finalized in a manner that prioritizes the required actions and resources necessary for implementation.

Full implementation across the province may require several years, depending upon the availability of resources to finance and staff the change. We are suggesting 5-7 years.

In relation to the Family Process, we recommend that changes be introduced in conjunction with the timeframes and implementation plans for the expansion of the Unified Family Court.

Ultimately, we believe that planning and implementation should begin as quickly as possible, and not await release of the Final Report. This will sustain the support and enthusiasm of the participants in the system and ensure that the advantages of resource realignment are achieved. We believe that the recommendations in this Report will form the basis of recommendations in the Final Report.

## **RECOMMENDATION**

**We recommend that a dedicated implementation team be established to work with and assist the Civil Justice Review in developing and executing a plan for the implementation of the recommendations contained in this First Report. The team should be comprised of representatives from the Judiciary, the Bar, the Ministry and the Public.**

We propose that the Implementation Team function, as well, through sub-working groups which will have responsibility for particular areas of the task and will report to the Implementation Team and to the Review itself. Such working groups should be formed to deal with the areas of case management, technology, the rules, and costs, and with such other matters as the Review and the Implementation Team may determine advisable.

The committee which we have recommended be created to examine the issue of an unified management, administration and budgetary model for the justice system should be a separate committee because of its nature.

## **CHAPTER 24**

### **TOWARDS A FINAL REPORT**

We have endeavoured in this report to lay out our vision of what the civil justice system should look like in the latter 1990's and into the next century. We expect that these recommendations will form the foundation and basis for our Final Report.

There is, as we have noted, however, much that remains to be done. Some of our recommendations can be implemented immediately. Others will require further consultation and refinement in the course of their implementation. Still others remain to be considered and examined further. In addition, there are a number of areas in which our Fundamental Issues Group is conducting research and formulating proposals which we will be receiving and considering in connection with our Final Report.

#### **Fundamental Issues Group**

It is the function of the fundamental issues group to deal with issues of longer range implications for the civil justice system. In this respect, it is considering such matters as,

- a) the role and function of civil juries;
- b) the question of how the superior trial court can most appropriately and effectively carry out its mandate in dealing with civil cases, in terms of the way in which various types of cases are processed within and/or outside of the courts;



- c) the role of Small Claims courts in providing effective access to the system, and the jurisdiction and structure of such courts; and,
- d) certain aspects of ADR.

In pursuing its mandate, the Fundamental Issues Group has held a consultation forum with leading academics from Canada, the United States and the United Kingdom; has commissioned a number of research papers in important areas; and is meeting with community organizations. These papers and the results of the fundamental group's input will be forthcoming prior to our Final Report. They will form an important element in our deliberations leading up to that Report.

### **Other Outstanding Issues**

There are several remaining issues which have been identified during our consultation phase and in our research efforts, and which we have not been able to deal with in any final way in this First Report. We have noted them, from time to time throughout the Report. They require continued and more detailed examination, and will be another focus of our Final Report. They include:

- a) issues surrounding the cost of justice, both from an institutional or systemic perspective and from the perspective of individual litigants;
- b) considerations regarding the form of service model and funding options with respect to court-connected ADR;
- c) questions relating to the criteria for determining the allocation of judicial resources;

- d) implementation of the family law recommendations;
- e) methods of streamlining the examination for discovery process and making it more cost-effective;
- f) venue (place of trial);
- g) enforcement procedures;
- h) questions pertaining to records management in the system;
- i) small claims;
- j) landlord and tenant matters; and,
- k) effective ways of dealing with construction lien claims;

## **Closing**

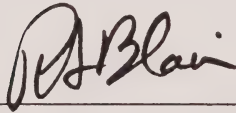
This is our First Report.

Its recommendations were formulated in the crucible of a broad consultation process involving the Public, Court Administrators, Ministry officials, members of the Bar, and the Judiciary. Expectations abound. Our deliberations were inspired by and hopefully engendered a growing spirit of co-operation amongst those who participate in and have responsibility for the civil justice system, and by a discernible will amongst those participants for positive restructuring and change.

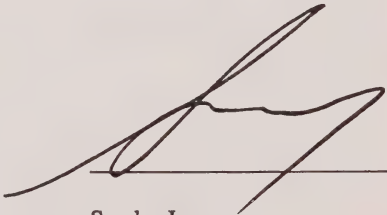
A sustained and far-reaching momentum is developing, nurtured by that sense of expectation, goodwill and spirit of change. It is critical that the moment of opportunity be seized, before it is lost. The public interest calls for it.

We tender this First Report and its recommendations in the same spirit, knowing that its vision of a new structure for the civil justice system will require much further effort in its implementation, but content that it points the way to an attainable civil justice system.

March 7, 1995

A handwritten signature in dark ink, appearing to read "R. Blair", written over a horizontal line.

The Honourable Robert A. Blair

A handwritten signature in dark ink, appearing to read "Sandra Lang", written over a horizontal line.

Sandra Lang

A handwritten signature in dark ink, appearing to read "Mary McConville", written over a horizontal line.

Mary McConville

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Terrence O'Sullivan

## **APPENDICES**



**LIST OF PROJECTS****JOINT COMMITTEE ON COURT REFORM - CASE MANAGEMENT PROJECTS**

The Joint Committee on Court Reform (JCCR) was established in 1988. It includes representatives of 10 Bar Associations in the Province, including the Advocate's Society, Canadian Bar Association - Ontario, the County of York Law Association, the Criminal Lawyers Association and the Law Society of Upper Canada. Representatives of the Judiciary and Courts Administration are also included. In 1988, the JCCR requested that system of case flow management be established in the Ontario Courts in order to address the problems of delay. Case Management pilot projects were established in Toronto, Windsor and Sault Ste. Marie. The JCCR established a number of subcommittees to guide and evaluate the performance of Case Management pilots.

Communications & Education Sub-committee

Evaluation Sub-Committee

Rules and Forms Committee

Steering Committee

Toronto Operations Committee (General Division)

Toronto Operations Committee (Provincial Division)

Toronto Family Law Bench & Bar Committee (General Division)

Toronto Civil and Family Case Management Advisory Committees

Ontario Civil And Family Case Management Advisory Committees



## **ADVOCATES' SOCIETY TASK FORCE ON BACKLOG**

In January of 1994, Roger Oatley, then the President of the Advocates' Society announced the creation of the Civil Justice Task Force on Delay. The goal of the Task Force is to examine the civil litigation process in Ontario with a view towards developing recommendations to remedy the problems associated with the delay in getting civil cases to trial and the increasing costs of civil litigation. Regional Committees, each with a designated member of the General Division Bench, were established to further consider the issue and to deliver regional reports.

## **SIMPLIFIED CIVIL RULES COMMITTEE**

The committee was formed in 1993 at the request of the late Chief Justice Callaghan and by the former Deputy Attorney General, George Thomson. It includes representatives from the Judiciary, the Bar, the Ministry of the Attorney General and Courts Administration. It was created to respond to the widely-held belief that only the wealthy or the legally aided could afford to litigate and that the cost to the parties of lawsuits involving relative modest sums is often disproportionate to the amount involved. The Committee was charged with the task of making recommendations to make civil, non-matrimonial litigation more affordable.

## **JOINT MINISTRY/JUDICIAL COMMITTEE ON THE DISTRIBUTION OF CIVIL CASES IN ONTARIO (VENUE COMMITTEE)**

The Committee was established in January of 1994. Its mandate was to consider how to apportion the civil case load to ensure speedy justice throughout Ontario. It includes representatives from the Judiciary, the Bar, the Ministry of the Attorney General and Courts Administration. It is responsible for evaluating and developing a recommendation for the Chief Justice of the Ontario Court (General Division) and the Attorney General which will allow for the speedy and efficient processing of civil cases in the judicial system.

## **COURT ANNEXED ADR CENTRE**

The Ontario Court of Justice (General Division) and the Ministry of the Attorney General initiated a two-year pilot project under which "Court Annexed" ADR (alternative dispute resolution) services are be provided in the Toronto Region. It provides for the referral of both new and existing cases to the Centre. It handles commercial disputes, construction lien cases, wrongful dismissal, contract and tort actions. The Centre does handle family law, landlord and tenant disputes or motor vehicle actions.

## **CBAO CIVIL LITIGATION SECTION - COMMITTEE ON ASSESSMENT OF COSTS, MASTERS AND REGISTRARS' OFFICES**

The Committee was formed by the Civil Litigation Section of the Canadian Bar Association -Ontario as a result of concerns arising from the decision to remove the power to appoint new Masters and the decision to reorganize the Registrar functions.

## **METROPOLITAN TORONTO COURTS FACILITIES PROJECT**

In March of 1994, the Coopers and Lybrand Consulting Group completed a study for the Ministry of the Attorney General and Management Board of Cabinet. The main objective of the project was to develop a "long range plan" and "functional planning" documents that describe the court facilities and other court resource requirements of the Ministry of the Attorney General and other key stakeholders for the next twenty years. The scope of the project included facilities required to provide court services for civil, criminal, family and other federal and provincial matters within Metropolitan Toronto - within both the General and the Provincial Divisions of the Ontario Court of Justice. Ten key reports and one final report were provided.

## APPENDIX 2

REGION	JUDGES			COURTS ADMIN			LAWYERS				
	MTG. DATE	NO. PRESENT	WRITTEN SUB.	STAFF PRESENTATION	WRITTEN SUB.	ATTENDING MTGS & MAKING SUB.	LAW ASSOC./BENCH BAR COMM. MIET	WRITTEN SUB. FROM LAWYERS	WRITTEN SUB. FROM CLINICS		
Central West	June 3	18	0	0	1	0	June 7 15 Lawyers	5	1		
Southwest	June 8 June 9	7 5 Teleconf.	1	June 8-Windoor(45) June 9-London(22)	3	London - 5	Windoor - Monitoring & Eval. Committee	6	3		
Central South	May 31	15	1	June 6 - 22	1	3	Family Lawyers	4	0		
Northeast	June 25	7	2	Sudbury - 12 Timmins - 5	7	Sudbury = 2 Timmins = 8	Cochrane & Sudbury	5	0		
East	June 17	19	1	June 2 Ottawa (10) June 16 Kingston (5)	8	Ottawa - 12 Kingston - 5	Frontenac & Carleton	13	2		
Central East	June 14 June 20	4 2	1	June 14-Whitby June 20-Newmarket	4	Whitby - 8 Newmarket - 8	-	9	1		
Metro Toronto	June 12	76	12	June 21 (13)	2 (From PDB)	3	-	12	4		
Northwest	June 22	9 Teleconf.	2	June 22 (3)	0	2 (Civil Liaison Comm.)	-	0	0		
Other								5			
TOTAL	-	162	20	-	26	-	-	59	11		

REGION	PUBLIC		NO. PRESENT	WRITTEN SUB. INDV. = I ORGAN. = O	MTG DATE	RCMACS	
	DATE OF PUBLIC HEARING						NO. PRESENT
Central West	June 28		20	I = 8 O = 2	June 7		10
Southwest	June 8-London June 9-Windsor		55 24	I = 6 O = 3	June 8		7
Central South	June 6		25	I = 7 O = 2	June 6		6
Northeast	June 23-Sudbury June 24-Timmins		20 3	I = 2 O = 2	June 23		6
East	June 2 - Ottawa June 16-Kingston		100+ 25	I = 18 O = 5	June 2-Ottawa		5
Central East	June 14-Whitby June 20-Newmarket		19 15	I = 14 O = 1	June 14		8
Metro Toronto	June 15		40	I = 19 O = 7	June 21		8
Northwest	June 22		12	I = 1	June 22		7
Other							
TOTAL	-		358	I = 75 O = 25	-		57



WORKING PAPERS

1. Research Compendium  
A 14 page document listing the materials considered or reviewed by the Task Force members and staff.
2. Family Law Group:  
List of Members  
Consultation with regard to new Family Law process
3. Summary Analysis of Private Bar Survey  
Analysis of responses from 8300 surveys sent to the members of the private bar who practice in the civil law area with respect to costs.
4. Summary Analysis of Public Survey  
Analysis of responses from 6000 surveys sent to members of the public with respect to court delays and costs.
5. Ministry of the Attorney General;  
Court Statistics Annual Report, Fiscal Year 1993/1994
6. Technology Consultation Survey  
Responses from County and District Law Associations regarding the level of technology available in law offices and the identification of technology needs.





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